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No. 1345

Supreme Court of the United States

OCTOBER TERM, 1969

JAMES D. SULLIVAN, PETITIONER

v.

EDWARD J. CHOQUETTE
HARVEY BEIT, AN ATTORNEY
JONATHAN G. WELLS III, AN ATTORNEY

AND

T. FRANCIS KELLEHER, FORMER CLERK OF THE NEWBURYPORT, MASSACHUSETTS DISTRICT COURT,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1969

No. _____

James D. Sullivan,

Petitioner,

v.

Edward J. Choquette,
Jonathan G. Wells III,
Harvey Beit,
and
T. Francis Kelleher,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

James D. Sullivan, the Petitioner above named, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit, insofar as it dismissed the Plaintiff's Original and Amended Complaint for failure to state a cause of action, and a claim upon which the Federal Court could grant relief for actions in tort asserted against the Respondents, and for the power of the Federal Court to restrain or enjoin, or other-

wise vitiate the effects of a judgment rendered in a State Court to afford litigant the last essential element to bring and to maintain an action for malicious civil prosecution against the Respondents, even though one of the Respondents was the Clerk of the Court in which a default judgment was rendered.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is set forth in the Appendix "A", infra.

The opinions in companion cases are set forth in the order below:

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JURISDICTION

Jurisdiction of this Court is invoked under 28 USC 1254 from a judgment of the United States Court of Appeals for the First Circuit, entered on December 30, 1969, which affirmed a judgment of the United States District Court for the District of Massachusetts.

QUESTIONS PRESENTED

The questions presented are as follows:

QUESTION ONE (1)

Does a State Court of Massachusetts acquire jurisdiction in personam, and is the service of process constitutionally valid, when service of a writ of summary process was accomplished by leaving the process at the last and usual place of abode, in a mail box, with no further attempt to give the process to anyone in the home, while the Defendant was, and was very well known to be 1500 miles from the Commonwealth of Massachusetts and the jurisdiction of the Court, and could not, and did not physically return until one day after the date of notice set forth in the writ, and was defaulted by Court without any further notice or service of process required by Massachusetts Statutes for absent resident defendants?

The text of the fifth and fourteenth amend-

ment to the U. S. Constitution is set forth in the appendix.

The texts of the enabling Massachusetts statutes governing service of process in the Commonwealth of Massachusetts are set forth in the appendix as MGLA c. 223 s 31; MGLA c 223 s 34; MGLA c 223 s 84; and MGLA c 227 s 7.

QUESTION TWO (2)

Does a land court in Massachusetts acquire jurisdiction in rem, and over the subject matter, when valid lease protected tenant from writ of summary process, and statutory 14 day notice to quit was premature, and defectively served by leaving the notice on the front lawn of premises, while lessee tenant was, and was very well known to be, 1500 miles from property, and landlord and his agent knew the hotel address of tenant, and rent had been tendered and paid in accordance with the terms of the written lease, and landlord, his agents and attorneys made no demand on premises, or written demand by mail for rents, when lease set forth no place of payment.

The text of the fifth and fourteenth amendment to the Federal Constitution are set forth in the appendix.

The Massachusetts statutes governing land, and writ of summary process are set forth in the appendix as MGLA c 186 s 11; MGLA c 239 s 1; and MGLA c 239 s 2.

QUESTION THREE (3)

Is Clerk of Court judicially immune, when Court had been notified by Defendant by special delivery air mail certified letter, that Defendant was out of state; and made two phone calls long distance to Clerk of Court to delay action until Defendant's arrival, and Clerk of Court tortiously created false jurisdiction in personam by entering letter as a general denial, and concealed the entry from the knowledge of Defendant and Defendant's attorney, and added to tortious behavior by various acts of commission and omission to obtain default judgment for landlord and his attorneys.

QUESTION FOUR (4)

Is a default judgment of a state court constitutionally valid, and does Federal Courts have power to invalidate and void the effects of such judgment, when face of the record manifests no less than twenty (20) overt violations of Court rules and State Statutes by Clerk of Court and opposing counsel of record, including fraudulent entries and changes in the docket, manifesting that the Defendant had appeared in Court, when the Defendant was en route to Massachusetts.

The fifth and fourteenth amendment of the Federal Constitution are set forth in the appendix.

The Federal Statutes are set forth in the appendix as 28 USC 1332; 28 USC 1343; 42 USC 1983, 1985, 1986; and 28 USC 1651.

The Massachusetts Statutes are set forth in the appendix as MGLA c 227 s 8; MGLA c 231 s 58; MGLA c 235 s 2.

The Rules of the District Courts of Massachusetts are set forth in the appendix as rules 3, 8, 10, 12, 13, 14, 22, 23, 36, 41, 58, and 72.

STATEMENT OF THE FACTS

In July of 1965, Petitioner signed a lease purchase agreement with Respondent Choquette, while Petitioner's wife was recovering from a nervous breakdown in Ancora State Mental Institution in New Jersey, and as a result of such agreement, moved his family, goods and chattels from New Jersey, and took residence of the leased premises located in Newburyport, Massachusetts. Petitioner tendered his rent regularily to Scott Realty of Newbury, Massachusetts, a neighboring town, and rent was generally tendered on premises to the Scott Realty Company when the agent for the same came to the premises on frequent dates to close the pending sale of the property as agreed in the lease.

In October of 1965, the Petitioner left for the southern region of the United States on a recruiting and organizing trip essential to the operation of his interstate business, and while so gone was visited by the Scott Realty Company on premises, whose agent was informed by

Petitioner's wife, Elsye Sullivan, that Petitioner has departed for Florida, (Ex 103, para-4)* and received payment for rent due up to and including November 13, 1965 (Ex 29, 96).* Petitioner's wife did on that date give to the agent for the Scott Realty Company the hotel and business address of the absent Petitioner (Ex 103, 104, para-5).* On the same date the agent for the Scott Realty Company did attempt to give back part of the rent, or all of it to the wife of the absent Sullivan (Ex 103, para-4) stating that she needed the rent for something else.

About the first week of November of 1965, the landlord Choquette contacted the law firm of Beit and Wells of Newburyport, Massachusetts who drafted a 14 day notice to quit to be served upon the absent Sullivan, and mailed the 14 day notice to quit to a deputy sheriff of Essex County, who received the notice to quit on November 11th, 1965, (Ex 106, 97) for service on November 13, 1965. On November 13, 1965, the notice to quit was served upon the absent Sullivan (Ex 106) signed by the Respondent Beit of the law firm of Beit and Wells of Newburyport (Ex 97) which specified that the tenancy was terminated for non-payment of rent in accordance with the terms of the written lease, and that any further payments made after the date hereof shall not be construed as a waiver of rights under the notice. Sullivan

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*Unless otherwise specified, the numbers preceded by Ex refer to pages in the certified record transmitted by the United States Court of Appeals for the First Circuit in the instant matter.

was the only tenant who signed the lease (Ex 28) since Sullivan's wife was in a State mental institution at the time of signing of the agreement.

On November 13, 1965, the absent Sullivan was engaged in the pursuit of his interstate business and was registered at the San Jaun Hotel in Miami Beach, Florida (Ex 107 - Affidavit of Max Gopman), (Ex 89 - Affidavit of James D. Sullivan, para 7), (written Interrogatories to witness Paul McIsaac, question 2, 3, 4, 5 and 6).[1]

With no attempt to collect any rents (Ex 104, para 6, 7) and 8 hours before any rents might have been due under the strictest interpretation of the lease (Ex 28, attached as Exhibit "A" to Plaintiff's Original Complaint), the Deputy Sheriff served the notice to quit by leaving the notice at the last and usual place of abode while the absent Sullivan was in Miami Beach, Florida, and the rent had been tendered in accordance with the terms of the written lease. The notice to quit was found three parts torn, lying on the front lawn of the premises by the children of the tenant some time later.

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1. Written Interrogatories of witness Paul McIsaac and Ray Mitchell were not included in the certified record transmitted, but are part of the District Court record transmitted, but not printed in the appendix, on appeal to the United States Court of Appeals, since their use was not necessitated to the questions on appeal to that Court.

With no attempts to collect any rents by the common law requirement of making a demand on premises, or by mail, the landlord Choquette, acting through attorneys Beit and Wells of Newburyport, served upon the absent tenant Sullivan a writ of summary process, which not only demanded possession of the premises but also demanded one thousand dollars ($1,000.) future rent, and required the absent Sullivan to appear in the District Court of Newburyport, County of Essex at 9 AM in the forenoon of December 13, 1965 to answer to the Complaint of Edward J. Choquette. (Ex 98, 122).

On Saturday, December 11, 1965, the Petitioner contacted the Clerk of the Newburyport District Court at about 11 AM, and confirmed the action which had been relayed to him by his wife late in the evening of Friday, December 10, 1965 by telephone. The Clerk confirmed that the action was filed and the date therein. After relating to the Clerk of the impossibility of such an appearance, and in an effort to gain time and obtain counsel, the Petitioner hurriedly typed a letter directed to the District Court of Newburyport, inadvertently dated it December 9, 1965 in haste, and designed the letter for the specific purpose to inform the Court that the service was defective, and that service would be accepted at a place of business in California, where the Petitioner cleared his orders in interstate commerce for future delivery. (Ex 121, 30 attached as Exhibit "C" to the Plaintiff's Original Complaint). (Written interrogatories to witness Ray Mitchell, questions 1 through 7, inclusive). Petitioner mailed the letter from Fort Walton

Beach Post Office at 11:45 AM on Saturday, December 11, 1965 and was receipted by the Clerk of Court, the Respondent T. Francis Kelleher, on December 13, 1965 at the Newburyport Post Office.

Notwithstanding the denial of the Court's jurisdiction at this early date, and before the issues were joined the Respondent Kelleher, as Clerk of the Newburyport District Court, and unknown to the absent Sullivan, entered the letter as a general denial on the docket of the Newburyport Court record. (Ex 128). At the precise hour, the absent Sullivan arrived at his Philadelphia office on Monday, December 13, 1965 at about 9:30 AM, having driven non-stop from Fort Walton Beach, Florida. (Ex 90, para 12). (Written Interrogatories to witness Paul McIsaac, questions 7 and 8).

The Petitioner then called the Clerk of the Newburyport Court the second time, and requested disposition of the case. The conversation was short, and the Defendant Sullivan was instructed that the matter was continued.

Arriving home in Newburyport, Massachusetts at about 5 AM on Tuesday, December 14, 1965 (Ex 90, para 12); (Ex 104, para 9), (Written Interrogatories to witness Paul McIsaac, question 8), the Petitioner went about his business on a local latitude, but again left the Commonwealth of Massachusetts on December 16, 1965 to negotiate the purchase of an automobile for subsequent use in the interstate business. (Ex 90, para 14). (Written Interrogatories to witness Paul McIsaac, questions

9 and 10). At that precise day, unknown to the absent Sullivan, the Clerk of Court had put the matter on the trial list, and showed the letter to the Special Justice of the Newburyport District Court, Norman Espovich. (Ex 56, para 6). (Ex 81, para 3). The Special Justice ordered the matter continued until December 30th, 1965 but no notice of that date is entered into the docket entries except a crossed off date of December 30, 1965, and the word "Default" smeared in in its place. (Ex 128, entry on December 16, 1965.) Not only was the matter placed on the trial list for December 16, 1965 without the benefit of notice, but it was also continued by the Special Justice until December 30, 1965 without notice.

On December 20, 1965, Petitioner mailed to the Scott Realty Company two checks of rental payments from November 13, 1965 to January 13, 1966 inclusive, which were subsequently held for cashing until December 31, 1965 (Ex 101, 102)[1]

On December 30, 1965, the matter was again called, and the Defendant Sullivan did not appear, having received no notice of any kind from the Court, or from the law firm of Beit and Wells. (Ex 128, docket entries of Summary Process action of Choquette v. Sullivan). The trial judge, Norman Espovich, ordered a default (Ex 81, 82, para 5 and 6).

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1. Shown to the United States Court of Appeals from original checks at oral hearing.

(Ex 56, 57, para 8) and possession for the Plaintiff Choquette, with no notice of such a default mailed to the Defendant, and a docket entry thereof (Ex 128). On December 30, 1965, the trial judge also ordered the writ of summary process to be amended, and suggested that the law firm of Beit and Wells file a motion which would delete the allegation for rent claim stating that it was improper. On December 31, 1965, the law firm of Beit and Wells, representing the Plaintiff Choquette, filed an amendment to the writ, without filing a motion, and without notice of motion, and proof of service of the same. (Ex 128). No notice of default was issued, nor does the docket attest to the same. (Ex 128).

On January 7, 1966, the Clerk of Court mailed to the law firm of Beit and Wells a copy of the order of execution without notice to the Defendant Sullivan. About two weeks later, on January 22, 1966, the Deputy Sheriff of Essex County left his calling card at the residence of the Defendant Sullivan, with the son of the Defendant, with instructions for the Defendant to call the Sheriff at his convenience.

On January 23, 1966, the Defendant Sullivan called the Deputy Sheriff by telephone, and made a subsequent appointment on January 25, 1966 at 8 PM to meet the Sheriff at the Sheriff's residence to discuss the purpose of the Sheriff's visit.

On Monday, January 24, 1966, the Defendant Sullivan left for work in the North Shore area of Boston, and had his wife contact an attorney in

Newburyport to ascertain the situation, and to see if the case had come to trial. Mrs. Sullivan went to the law offices of a Newburyport attorney, who called the Clerk of Court, who in turn relayed the message to the Newburyport attorney that no letter was ever received by the Court, nor was the Clerk aware that any phone calls had ever been made while Mr. Sullivan was in Florida. (Ex 104, 105, para 14) (Ex 107, Affidavit of Robert Hoffman, last para).

On Tuesday, January 25, 1966, the Petitioner and several of his sales personnel called at the offices of the Newburyport attorney, who again called the Clerk of the Court, who again relayed the same information, with further information that the time for filing an appeal had expired.

On the same day, the attorney called the law offices of Beit and Wells, and spoke to the Respondent Jonathan G. Wells III, who instructed the tenant's attorney that the Choquettes would not meet under any circumstances, and that Sullivan was to give them one thousand dollars balance of the lease, and another one thousand dollars ($1,000.) deposit on the premises to be applied against the sale price of sixteen thousand nine hundred dollars ($16,900.) to be negotiated immediately. Records show in the registry of Deeds in Essex County that Choquette had assumed a mortgage of ten thousand four hundred dollars ($10,400.) with no down payment from the Veteran's Administration several years prior.

After several days of negotiations between the attorneys for the parties, the weather conditions transpired into the worst in several decades with as much as thirty inches of snow dumped in the area, and gale winds as high as fifty miles per hour. Snow had begun falling on Saturday, January 22, 1966 and continued in increasing amounts during the following week. On January 26th, 1966, Respondent Choquette sent a verbal threatening message via a Jean MacDonald, a tenant using the Sullivan garage to the effect that Sullivan had better buy the house by Thursday, January 27th, 1966, or he will be out by Saturday, January 29th, 1966. On January 27th, 1966, upon returning from various realtors in the Gloucester, Massachusetts area, the tenant Sullivan confronted the same Jean MacDonald about threatening his wife and children, and the same Jean MacDonald called the landlord Choquette, and reported that the tenant Sullivan had been highly abusive to her; whereupon, Choquette called the law offices of Beit and Wells, who in turn called a deputy sheriff from a sick bed (Ex 106, Affidavit of George Cashman, para 4) to serve the order of execution assisted by two uniformed police officers of Newburyport, in a police car complete with flashing emergency lights. The tenant Sullivan received the Sheriff at his front door, and was instructed by the Sheriff that he had until 9 AM on Saturday, January 29, 1966 to vacate the premises, and that a moving van would be at the premises at that hour to dispose of his furniture and chattels.

On Friday morning, in weather in which snow plows had worked frantically all evening to

clear the roads, the Plaintiff-Petitioner left the premises to continue looking for a home until about 3 PM when he returned to the premises to obtain his wife. While being escorted by a realtor, and Paul McIsaac, the Petitioner and his wife returned to the premises about 5 PM and were greeted by the Sullivan children on the street, who were frantic with fear. During the interim a child of the tenant Sullivan had opened a packed box containing a wrapped lamp, had unwrapped the lamp, unwound the cord from its stem, plugged in the cord to a live outlet, and began playing with the exposed socket, which had been rendered bulbless for moving and storage. The child had put her tongue into the socket, became frozen to the base, and lost most of her tongue tissue. Only her screams fortunately brought a four year old to her rescue, who pulled the plug from the outlet. The Petitioner immediately took the child to the Newburyport Hospital who in turn made hasty arrangements to transfer the child to the Children's Center in Boston, Massachusetts, where upon arrival, the child was pronounced highly critical, and put under intensive care. The Sullivans stayed all evening at the Children's Hospital beside their twenty-three month old child who was placed on the critical list.

On Saturday, January 29th, 1966 at 9 AM, while the movers were at the Sullivan's door, the tenant Sullivan, at the suggestion of the Chief Justice of the Newburyport District Court, filed a petition for a stay of execution, based on the events of the evening before, and on the fact that quarters were totally unavailable for

his family on such short notice. The petition was firmly resisted by the landlord Choquette, and his attorney appearing, the Respondent Jonathan G. Wells III of the law firm of Beit and Wells. The Court then ordered the parties to separate rooms in the Courthouse, and the attorney for the Sullivan family brought in a stipulation from opposing counsel that Sullivan must move in five days, and stated that Sullivan must move voluntarily, which the tenant signed under extreme duress, and stated so in front of his attorney and one Paul McIsaac. (Written Interrogatories to Paul McIsaac, questions 33 to 38, inclusive).

Defendant Sullivan then took four of his children who were attending the Newburyport schools to be cared for by his mother, Mary V. Sullivan, in Ocean City, New Jersey, who suffered a stroke as a result of the events and the pressure of the school children, upon her, while the other children were put in a small basement apartment in Sea Brook Beach, New Hampshire to be cared for by Mrs. Sullivan, who necessarily had to remain within proximity to the injured child in the Children's Hospital in Boston, Massachusetts. The family had to remain in this status quo for a period of nine months, until late in November of 1966, when the Petitioner reunited his family.

On November 9th, 1966, the Petitioner contacted the Chief Justice of the Newburyport District Court to ascertain the method and manner in which the default judgment occurred without his knowledge. After corresponding with the Clerk of the Court, the docket entries

were provided for the Petitioner, with the exception of the certified copy of the "Defendant's Answer, General Denial" which appeared on an entry of December 13, 1965 (Ex 128). After several requests for the certified copy of the Defendant's Answer, General Denial, the Clerk enclosed the Sullivan letter from Florida, which had been mailed from Fort Walton Beach, Florida, which the Clerk had denied he knew anything about to the attorney for the Sullivans in the presence of Mrs. Sullivan.

Following the strenuous research of the Massachusetts Statutes and District Court rules the Petitioner filed a petition for a Writ of Error in the Superior Court of Massachusetts, No 139,788, Essex County on a 1962 Amendment of the General Laws which gave concurrent and original jurisdiction to the Superior Courts of Massachusetts of matters which had been heretofore the exclusive and original jurisdiction of the Supreme Judicial Court of Massachusetts. (A - Appendix E)** The petition was dismissed for want of jurisdiction of the Superior Courts of Massachusstts over writ of error.

In December of 1967, the Petitioner filed an action of tort against the Respondent Kelleher for causes of action for negligence, gross negligence, and for willful, wanton, and reckless conduct in the performance of his duty as

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**Unless otherwise specified, the numbers preceded by "A" refer to the pages of the Appendix of the petition for a writ of certiorari.

the Clerk of the Newburyport District Court, and the District Court for the District of Massachusetts dismissed the action for failure of the Petitioner to state a cause of action, since the Clerk was subject to judicial immunity. The Petitioner appealed to the United States Court of Appeals on the grounds that the District Court of Newburyport did not have jurisdiction in personam, and that the defect was never cured in accordance with the due process clause of the Federal Constitution, and the Statutes of Massachusetts. Bypassing the personam aspect of the jurisdiction, the U. S. Court of Appeals, on the assumption of the Petitioner's attorney, said that the District Courts have general jurisdiction over the land, and thus the Clerk is still judicially immune. This decision is set forth in the appendix as a companion case to the instant matter. (A - Appendix B).

On December 23rd, 1967, the Petitioner brought an action of breach of contract, and abuse of process against the Respondent Choquette, and against Choquette and Wells for abuse of process both severally and jointly. Disregarding the Petitioner's argument that eviction into a snowstorm with a family of eight, with hardly any time to relocate, caused his family severe damage, along with severe irreparable damage to his interstate business.

The District Court of Massachusetts, Caffrey J. ruled that the order of execution was used exactly for the purpose for which it was designed; that is, to recover the premises and restore the possession to the owner. This case is reported at 289 F. Supp. 780, and was dismissed for lack of prosecution by the United States Court of Appeals for the First Circuit, No 7253, (A - Appendix C).

On October 30, 1968, before the decision of the United States Court of Appeals for the First Circuit heard the oral arguments of the appeal from the dismissal in the Kelleher matter, the Petitioner filed the instant action in the United States District Court for the District of Massachusetts to have the default judgment of the Newburyport District Court vitiated or invalidated to afford the Petitioner the last essential element to bring and maintain a malicious civil prosecution action against the Respondents Choquette, Beit and Wells, and against the Defendant Kelleher for assisting the other Respondents for bringing and maintaining a groundless action of law, and maliciously using the Massachusetts Statute MGLA c 223 s 31 to provide adequately for proper service of process of both the notice to quit, and the writ of summary process. This action was filed as a result of the dismissal of the Petitioner's writ of error petition in the Superior Court of Massachusetts, which had been subjected to a total of six delays, and three changes of attorneys for the Respondent Choquette, and interference by Norman Espovich, the presiding special justice of the Newburyport District Court, who rendered the

default judgment, without ordering further notice to the Defendant Sullivan of the continuance. (Ex 162, Affidavit of James D. Sullivan, including Exhibits A and B from Attorney General's Office of Commonwealth of Massachusetts). (Ex 176, Affidavit of Harvey Glass, Esq. from 176 to 179, inclusive). (Ex 179 Affidavit of James D. Sullivan, para 5).

In March of 1967 the Respondent Wells, represented by the Respondent Beit, brought an action of contract against the Respondent Choquette known as Wells v. Choquette, No 7694 of the Newburyport District Court, Massachusetts, which manifested the contract relationship which the Respondents entered into to force the sale of the home to the Petitioner in the subsequent use of the order of execution which was obtained by the default judgment. The declaration in that matter showed the exact costs to the law firm of Beit and Wells, who were subsequently excluded from commissions of six hundred dollars ($600.) when the Respondent Choquette welched on the contract and sold the vacant premises on November 1, 1966 to David and Maryanne Levine of Topsfield, Massachusetts, which was negotiated by the Burton Checkoway Real Estate Agency of Newburyport, Massachusetts, without the aid, or the assistance, or legal advice of the law firm of Beit and Wells of Newburyport, Massachusetts.

The United States District Court of Massachusetts, Garrity J. dismissed the Plaintiff's Original Complaint, and the Plaintiff's Amendment to the Original Complaint based on the

fact that the matters were res judicata, and that the limitation of time had expired, and that the Clerk of Court was judicially immune, and the Plaintiff had failed to state causes of action. The Plaintiff appealed to the United States Court of Appeals and clarified through an extensive brief, and 30 minutes of oral argument, that the cause of action for a malicious prosecution and fraud action, was grossly misconstrued by the District Court for the abuse of process action reported at 289 F. Supp. 780 .. Sullivan v. Choquette et al. Plaintiff set forth all the essential elements of a malicious prosecution action, and prayed to the Federal Courts to use its power to vitiate the default judgment by granting post judgment relief under the civil rights titles, the effect of which was to afford the Petitioner the last essential element to bring and maintain an action for malicious prosecution, with damages arising from the time the notice to quit was left on the lawn of the premises of the Petitioner's home in Newburyport in November of 1965.

On December 30th, 1969, the United States Court of Appeals handed down the decision attached in the Appendix, which asserted that since the Defendant Sullivan received actual notice from his wife by telephone, while he was in Fort Walton Beach, Florida, the defect in the service of process was cured, and the blame is thereupon on the Defendant Sullivan.

This petition for a Writ of Certiorari is directed to the United States Supreme Court for a Writ of Certiorari directed to the United States Court of Appeals for the First Circuit

for stern and exact guidance, and for a fair and a most honorable decision in keeping with the distinction and the elevation of the United States Courts, and the purpose for which they were created.

BASIS FOR FEDERAL JURISDICTION

Federal Jurisdiction in the court of first instance was invoked under the fifth and fourteenth amendment of the Federal Constitution, and under 28 USC 1332, 28 USC 1343, 42 USC 1983, 42 USC 1985, and 42 USC 1986. Jurisdiction for partial relief prayed for was invoked under 28 USC 1651.

REASONS FOR GRANTING THE WRIT

ARGUMENT

As to Question One

The ways in which men can commit mistakes in reasoning are practically endless, but there are recurring patterns of faulty argument to which the human intellect seems especially vulnerable. In logic, these faulty arguments are called fallacies, whose etymology emanates from the latin (fallere, meaning "to deceive").

To construct a simple syllogism, and give the premise, or the antecedent, a narrow proposition, and then attempt to render a judgment with a wide conclusion, is one of the simplest and most discernible of all the fallacies in the reasoning pattern. This fallacy is commonly known as asserting the consequence. It is like stating that the streets are wet, therefore it has been raining. In its simple pattern of deceiving the reader, it is very analogous to "Sullivan had 'actual notice', therefore Sullivan had due process of law, and equal protection of the laws of the Federal Constitution, the Commonwealth of Massachusetts, and the Rules of the District Courts of Massachusetts."

Applying all of the facts, and giving the facts and circumstances the application of the formula set forth in the ruling of Mullane v.

Central Hanover Bank and Trust Company 339 U. S. 306, 70 S. Ct. 652 the narrower premise of "actual notice" claw sharply into the grain of the precise thinking which emanates from the syntax and word power set forth in that ruling where the Court said (339 U. S. at p. 314; 70 S. Ct. at p. 657):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action, and afford them an opportunity to present their objections. ******Citing cases.
>
> The notice must be of such a nature as to reasonably convey the required information, Grannis v. Ordean, supra, and it must afford reasonable time for those interested to make their appearance, Roller v. Holly, supra, and Goodrich v. Ferris 214 U. S. 71, 29 S. Ct. 580, 53 LEd 914."

The difference between the premise "actual notice" and the premise "reasonably calculated notice, under all the circumstances, with opportunity to be heard" run miles apart, yet on the same latitude because of the ambiguity of the Circuit Court's connotation of "actual notice".

One could easily receive actual notice of an incident or matter, yet be circling the moon, in this day and age, but not have reasonably calculated notice, under those conditions, which would afford an opportunity to be heard.

Sullivan received "actual notice" via telephone from his wife that he had to appear in Court in Newburyport at 9 AM on December 13, 1965 on a Monday morning. This "actual notice" was conveyed on a Friday evening, December 10th, 1965, late in the evening, while the Defendant Sullivan was 1500 miles distant, and with the responsibility of a one hundred thousand dollar ($100,000.) per annum business to run and maintain, which necessitated his daily attendance because of its idiosyncratic mechanisms and circumstances. Confirmation of the "actual notice" was sustained the following morning by calling the Clerk's Office, which by Rule 72 of the District Courts remained open until 12:00 noon on Saturdays.

Because the action was confirmed with the Clerk, Sullivan wrote a letter, the context of which was specifically designed to deny the jurisdiction of that Court by allegations of improper service, and giving to that Court a proper place where the defect could be cured. (Ex 30, 100 last para). The letter was typed and mailed with less than 48 hours to check in receipts of twenty salesmen still in the field until 6 PM of the same day, and give instructions to assistants to operate the business during his absence; travel fifteen hundred miles; necessitate a stop in Philadelphia to obtain evidence in the form of cancelled rent checks (Ex 29, 31, 32); and arrive at Court in Newburyport on December 13, 1965 at 9 AM for hearing in the Newburyport District Court.

The trip by automobile began about midnight of December 11th, 1965, and continued all through the night, the next day, the following evening, until arrival in Philadelphia at about 9:30 AM on December 13, 1965. It was at this point that the "actual notice", described in the decision of the United States Court of Appeals for the First Circuit (A-1) fell constitutionally defective in violation of the due process clause of the 5th and 14th amendment, because the actual notice was not reasonably calculated, under the circumstances, to afford the opportunity to be heard.[1]

In the absence of the due process argument, the logic of the Circuit Court's ruling falls short of the equal protection clause of the 14th amendment with respect to the Massachusetts Statutes mandatorily requiring further notice under the empowering Statute General Law 223 s 34 (appendix) and the Statute General Law 227 s 7, which requires the action to be continued until notice is given in such manner as it may order. The Statute General Law 223 s 84 specifically requires the Court, upon motion of the Plaintiff or Petitioner, to issue further writs, processes or orders, which shall be served as it directs, and upon due service thereof, the Court shall thereby acquire the same jurisdiction as it lost, over both the subject matter and the parties. The docket entries are barren (Ex 128) of any further

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1. The date of December 13, 1965 became moot at this point, and further notice was required.

notice or service of any writs, processes or orders, nor did any such further service ever occur, either to Sullivan or to anyone in the Sullivan home, or to P. O. Box 751, Hollywood, California, the offices of International Association of Photographers. (Deposition of Ray Mitchell, Interrogatories 8, 9, 10 and 11).

The affidavit of Norman Espovich verifies that the action was continued until December 30, 1965 (Ex 81, para 3 and 4), yet the docket entries (Ex 128) are barren of any such continuance, only the crossed off words (December 30, 1965) and the word "default" inserted in its place. Rule 58 of the District Court Rules states that nothing shall be deemed part of the record except the docket entries, and Rule 41 requires the Clerk to be answerable for all the records and papers filed in the Court. The docket is still barren of any such continuance, or any notice thereof, by either the Court, or by the then Plaintiff Choquette.

To sanction a proceeding rendering a judgment valid at a new date, without giving notice of the subsequent date, and hold that it is a judgment rendered with jurisdiction, and binding when set up at that new date, would be to violate the fundamental principles of due process of the law, and do violence to that requirement of every system of enlightened jurisprudence which judges after it hears, and condemns only after a party has had an opportunity to present his defense. By continuing until December 30, 1965, without notice to Sullivan, the Court lost the jurisdiction of the cause and the person of the Defendant Sullivan.

A new judgment in personam could not be rendered against a defendant until by voluntary appearance, or due process of service, the Court had again acquired jurisdiction over him. As a matter of common right, before any judgment can be taken he should have legal notice which would afford opportunity to be heard. [1]

Nor will it suffice that as a matter of grace that Sullivan was given sufficient notice. The act itself must provide such notice as with reasonable probability will apprise the Defendant of the pendency of the proceeding.

Forgotten by the U. S. Court of Appeals are indisputable citations of the Massachusetts Courts which apply to very situation at bar. These holdings have their root in the case of Blanchard v. Wilde 1 Mass. 342 and continue through a long line of strict holdings including Smith v. Page (1862) 86 Mass. 94, 4 Allen 94; Porter v. Prince (1905) 188 Mass. 80, 74 N. E. 256, Karrick v. Trask (1921) 238 Mass. 476 131 N. E. 216. (See also Fitzgerald v. Salentine 51 Mass. 436, Packard v. Mathews (1857) 75 Mass. 311, 9 Gray 311; Johnson v. Thaxter (1858) 78 Mass. 198; Commonwealth v. Aronson (1942) 313 Mass. 347, 44 N. E. 2nd 479.) (See also 38 Boston University Law Review page 268 (1958).

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1. Paraphrased from Wetmore v. Karrick 27 S. Ct. at page 440; 205 U. S. at page 160.

These holdings all required further notice to absent resident and non-resident defendants, under the Statutes revised to each respective period which have evolved into the Statutes General Law C. 223 s 34; C. 227 s 7; and C. 223 s 84, all providing further notice to absent defendants, whether resident or non-resident. These Statutes arise from the use of the constructive type of service permitted by General Law C. 223 s 31, and the lack of precise use of constructive service of process lays insult to the integrity of Fisher v. Jordan CCA Tex. 116 F2nd 183, Certiorari denied, Jordan v. Fisher 61 S. Ct. 312, 312 U. S. 697, 85 L. Ed. 1134. This ruling conflicts from the ruling in the instant matter, where the Court has ruled that Sullivan had "actual notice" by telephone, under impossible circumstances, and ruled that there was no defect in the service of process. The Circuit Court of Appeals in the Southern District ruled that a Statute permitting service of process other than personal service must be strictly complied with in order to confer jurisdiction on the Court.

The Statute MGLA C. 223 s 31 specifically sets forth that service must be provided as provided in the three following sections, of which is included MGLA C. 223 s 34:

The proposed superior court rules relative to service of process (1931) 16 Mass. L. Q. No 5, p. 36 deals with the subject of service on residents of Massachusetts in which this article says:

"Residents apparently may be bound by reasonable substituted service; and may be compelled to resort to writ of error or other form of direct attack, even where there is no service at all. ***** But a judgment, under our Statutes, against a resident, may sometimes be set aside as invalid upon direct attack by writ of error, though service has been made as provided by the Statutes. General Law C. 223 s 34 and General Law C. 227 s 7 provide for additional notice, in such manner as the Court may order, where (1) service is made by leaving the process at the last and usual place of abode at a time when the defendant is in fact absent from the Commonwealth, and (2) where any form of service is made other than leaving at the last and usual place of abode or personal service on the defendant or his agent appointed under General Law C. 227 s 5. The failure to give such additional notice vitiates the judgment on writ of error, although the defendant is a resident."

The absence of the further notice or service of process in the instant matter vitiates the default judgment of the Newburyport District Court as being violative of the equal protection clause of the 14th amendment of the United States Constitution, and the United States Court of Appeals for the First Circuit has conveniently avoided the application of the equal protection clause of the Constitution regarding the further notice and service Statutes of the Commonwealth of Massachusetts, mandatory for absent resident defendant, and they have rendered an illogical,

incomplete, and harsh decision, completely devoid of reason, and rationalized upon the false premise that "actual notice" represents "reasonably calculated notice, under all the circumstances, with opportunity to be heard"; and that "actual notice" represents "further notice and service, and proof thereof" required for the Massachusetts Statutes MGLA C. 223 s 34; MGLA C. 223 s 84; and MGLA C. 227 s 7.

ARGUMENT

As to Question Two

This argument has its cause in the obscurity and complexity of the matter itself, which was lost in the confusion and falsity of the opinion reached in Sullivan v. Kelleher 405 F2nd 486 (1st Cir. 1968).

The falsity is rooted in the falsity of a judgment and conclusion which was derived from a premise upon a misapprehension of fact, law, and unjustifiable assumption that the District Courts of Massachusetts have general jurisdiction over the land; hence, the Clerk of the Court in Sullivan v. Kelleher, supra, was judicially immune. The present action, filed two months before the decision was handed down, raised different questions of law, fact, and logic, and rested upon a different cause of action, and cannot be subjected to the doctrine of res judicata, and must run its course and natural remedies at law, and must be subjected

to stern review for its own cause of action, and not to be confused in assumption of law premised in the matter of Sullivan v. Kelleher, supra.

To assume that the District Courts of Massachusetts have general jurisdiction over the land leads the reader to believe and be deceived (1) in the ambiguity of the word "general" and (2) in the premise "jurisdiction over the land".

It is because that ruling[1] claimed to prove something from inadequate and erroneous assumptions that makes the judgment and ruling more deceptive and dangerous.

The basis of a District Court or Superior Court in the Commonwealth of Massachusetts acquiring jurisdiction in rem, or over the land, is found in the Statutes, General Law C. 239 s 1, and General Law C. 239 s 2. General Law C. 239 s 1 specifies and defines a person who is entitled to the land. The person's qualification of "being entitled" before the Court can acquire this jurisdiction, rests squarely on the premises set forth in that Statute, viz:

> "If the lessee of land or tenements or a person holding under him holds possession without right after a determination of a lease by its own limitation or by notice to quit or otherwise. . . ." ". . . . the person entitled to the land may recover

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1. Sullivan v. Kelleher 405 F2nd 486 (1st Cir. 1968).

possession thereof under this chapter. . ."

General Law c 239 s 2 states that such a person may take from the Superior Court or the District Court in which the land lies, a writ in the form of a summons.

However, the pre-requisite of determining the lease now becomes a necessary function prior to the Court acquiring jurisdiction over the land and the subject matter, for it the lease were valid, and not severed, there is no question of title; hence, no subject matter, since the lessor is entitled to possessions by virtue of the lease.

The determination of a lease must be accomplished by its own expiration, or by a statutory "notice to quit" by the express and clear terms of Massachusetts General Law C. 186 s 11, the emphatic structure of which requires a neglect or refusal on the part of the tenant to pay the rent under the terms of the lease, and in default of these terms, fourteen days' notice, given in writing, shall be sufficient to determine the lease, except if the tenant pays and tenders all rent then due to the landlord or his attorney four days before the return date of the writ, providing, and assuming, of course, that the writ is not defective on the return date. To be considered also are the specific terms of the lease, and their conditions, before a person can be entitled to the land under MGLA C. 239 s 1.

On November 13, 1965, the Deputy Sheriff of Essex County (Ex 106, para 2) served a notice

to quit (Ex 97, Ex 112, para 1) upon the absent Sullivan (Ex 103, para 5; Ex 107, 108, para 2 and 3). (Deposition of Paul McIsaac, questions 3, 4, 5, and 6.) On November 13, 1965, the rent had been paid (Ex 96; Ex 29) up to, and including November 13, 1965. Not only was the notice to quit served prematurely, but also without probable cause, since there was not even an opportunity to refuse or neglect to pay the rent due under the terms of the written lease, to afford the landlord Choquette to fall into that category of those entitled to the land under the express conditions of the General Law C. 239 s 1.

On further legal premises, the lease sets forth no place of payment (Ex 28). To effect a forfeiture for non-payment of rent the landlord must make a demand upon the premises before sending a fourteen day notice to quit to qualify his status under neglect or refusal. This situation and set of circumstances sets squarely in the teeth of the decision of the United States Supreme Court in Henderson v. Carbondale Coal and Coke Co. 140 U. S. 25, 35 L. Ed. 332, 11 S. Ct. 691; Prout v. Ruby 15 Wall (U. S.) 471, 21 L. Ed. 58; Sheets v. Selden 7 Wall (U. S.) 416, 19 L. Ed. 166; Connor v. Bradley 1 How (U. S.) 211, 11 L. Ed. 105 (See also 32 A, Jur s 855, page 724, footnote 1, and cases cited therein). See also Am Jur s 859, pages 726, 727.

The leading authority in Massachusetts is reported in the matter of Chapman v. Harney 100 Mass. 353, where the Supreme Judicial Court of Massachusetts ruled that a lease which sets

forth no place of payment requires the landlord to make a demand on premises, at the most notorious place, at a convenient time before sunset, to effect a forfeiture (at page 354).

The Respondents Choquette, Beit and Wells neglected to consummate this legal necessity, and consequently, in spite of the fact that the rent had been paid, the lease (Ex 28) was not severed in accordance with General Law C. 186 s 11, and remained unsevered and in full force on December 13, 1965 and on December 30, 1965, thereby excluding the Newburyport District Court from general jurisdiction over the land, and precluding jurisdiction in rem.

While there might be a fatal argument that the Newburyport District Court has a faint jurisdiction to decide or perceive if the landlord-tenant relationship existed, it could not exercise that jurisdiction without gaining the personam aspect of the jurisdiction, which it lost as a result of defective service of the writ of summary process, and was not cured in compliance with General Law C. 223 s 34, C. 223 s 84, and C. 227 s 7, which merely required further notice, and upon proof thereof, the Court could again acquire the same jurisdiction over the parties and the subject.

ARGUMENT

As to Question Three

When a public official is charged with the responsibility of protecting the rights of due pro-

cess and equal protection of the law, so acts in such a capricious, arbitrary, and outright prejudicial manner, he not only derrogates from those rights, but he denies to that individual his civil rights guaranteed by the Federal Constitution; the right to notice, and opportunity to have his day in Court. The legislation of the civil rights titles was designed to fortify those rights, and to give remedy in the Federal latitude. Virtually all citizens, be they public officials or not, are held answerable for their tortious acts, which constitute the denial of another's rights. One of the few exceptions, however, has been the immunity granted to our Judges, and to those whose duties fall within, and under cover of judicial responsibility. This immunity, well founded on reason, keeps the Courts free to decide without fear of legal redress, so long as that decision was under the Court's jurisdiction.

This immunity emanated from the English Common law to the effect that "The King can do no wrong", and has been religiously followed in a long line of decisions starting with Bradley v. Fisher 13 Wall (80 U. S.) 335, 20 L. Ed. 646 (1871) to Pierson v. Ray 87 S. Ct. 1217, 18 L. Ed. 2nd 294 (1967), where it was held that even the civil rights acts do not affect the traditional immunity.

The immunity of a judge, or a quasi-judicial official, is not without limitation, nor is it absolute, since it does not extend, and cannot extend to acts which are clearly outside their jurisdiction.

This principle, which is an important and fine distinction, was set forth as early as 1871 in the landmark case of Bradley v. Fisher supra, where the Court said:

> ****** Judges of Courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously, or corruptly. A distinction must be here observed between excess of jurisdiction, and the clear absence of all jurisdiction over the subject matter. When there is no jurisdiction over the subject matter, any authority is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the Judge, no excuse is permissible. (Emphasis supplied)

There is no case since to UNDERCUT THE VITALITY OF BRADLEY V. FISHER, SUPRA. There has been no ruling since to offset the rhetorical splendor of Bradley v. Fisher, supra.

In December 1965 case of Choquette v. Sullivan, No 7314, Newburyport District Court, Massachusetts, due to the landlord Choquette failing to sever the lease in accordance with the Statutory requirements, and due also to the defective service of process of the writ of summary process, and the absolute knowledge of T. Francis Kelleher of that defective service; the failure of the Newburyport District Court to reacquire that jurisdiction under MGLA C. 223 s 84; and the failure of the Plaintiff Choquette to

avail himself of the opportunity to cure the defect under MGLA C. 223 s 34, and MGLA C. 227 s 7; THE NEWBURYPORT DISTRICT COURT WAS IN THE CLEAR ABSENCE OF ANY JURISDICTION IN PERSONAM OR IN REM, and over the subject matter.

There is no doubt that the actions of the Respondent, T. Francis Kelleher, in providing a jurisdiction to the Court, when there was no jurisdiction; in setting the matter into trial without allowing Sullivan to participate; and denying Sullivan his right to appeal by various acts of omission and commission which constituted no less than twenty violations of procedural rules; constitutes tortious behavior in the performance of his ministerial duty, the proper performance of which he owed to Sullivan as a duty, and a right which belonged to James D. Sullivan as a taxpayer, and a newly arrived citizen of Newburyport, Massachusetts.

The Writ must be granted to define the difference of ministerial duty and judicial duty, and to review the question as to which sets higher in priority; the principles of the Constitution set forth in the fifth and fourteenth amendments regarding due process and equal protection of the laws which give rise to the jurisdiction under which the doctrine of judicial immunity arises; or do we grant the immunity before the jurisdiction is legally and successfully acquired, and protect the rights of citizens under the Federal Constitution after the doctrine of judicial immunity has been safeguarded?

ARGUMENT

As to Question Four

Arguments and conclusions which prove something other than the point in question are fallacies beside the point, or of irrelevant conclusion. Lincoln described this fallacy in one of his debates with Douglas: "I assert that you are here today, and you undertake to prove me a liar by showing that you were in Mattoon yesterday. I say that you took your hat off your head, and you prove me a liar by putting it on your head."[1]

The fallacy of "beside the point" has its foundation in the word Elenchus, and goes back to the Greek Law Courts meaning "the charge to be refuted"; hence, the latin term for this fallacy is Ignoratio elenchi or ignorance of, or disregard for the charge to be refuted.

In drafting the Plaintiff's Original and the Plaintiff's Amendment to the Plaintiff's Original Complaint, the Petitioner (Ex 17, 18, 19, 20, 21 and 22) has set forth allegations of at least seventeen violations of Court rules and State Statutes, any one of which would give the Federal Courts the power to enjoin or vitiate the default judgment of the Newburyport District Court, as the sum total of all have led to

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1. Carl Sandburg, Abraham Lincoln, Dell Publishing Co., Inc. New York, 1959, Vol. I, p. 239.

a total denial of civil and Constitutional rights set forth by these rules.

The ruling by the United States Court of Appeals for the First Circuit is an evasion of an uncomfortable issue by sophistical formulae; that is to disregard the other errors of the Respondents past the issue of service of process of both the writ of summary process and the 14 day notice to quit. It takes the simple form of slanting the discussion in a new direction, or the more obvious and extreme form of drawing a red herring across the trail. The spokesmen for Russia in the United Nations have proved themselves adept in the tactics of diversion; when challenged about the occupation of Hungary they respond by talking about the evils of Western colonialism, or imperialist warmongering, or, as on one famous occasion, by beating on the desk with a shoe.

The ruling of the United States Court of Appeals has conveniently swept the dirt under the rug, and bypassed the other errors of the default judgment rendered in the matter of Choquette v. Sullivan, No 7314 of 1965, Newburyport District Court, Newburyport, Massachusetts. They have beaten the desk with the shoe of "actual notice" by telephone, and drawn the attention away from the other errors which have been systematically laid out for review by the Federal Courts in the Plaintiff's Original Complaint. [1]

1. The rules of the Massachusetts District Courts regarding defendants in summary process actions should be reviewed for their wanting of due process, and equal application, as

In deciding whether or not the Court will grant the writ, it will behoove the Court to carefully read the Plaintiff's Original Complaint, and the Plaintiff's Amendment to the Plaintiff's Original Complaint. (Ex 3 to 37, inclusive, and Exhibits attached thereto).

In the complication of the issues where there are many subordinate factors, the United States Court of Appeals has evaded these factors, and in place of taking the bull by the horns, has succumbed to the temptation of oversimplification, and distracted attention from the main theme of the argument -- the other prejudicial errors which occurred from December 11, 1965 until January 7, 1966 in the civil matter of Choquette v. Sullivan, No 7314 of 1965, Newburyport District Court, Massachusetts.

CONCLUSION

A citizen of the United States is still waiting for his day in Court. The writ of certiorari must be granted, and upon its determination, the matters remanded back to the District Court,

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opposed to those defendants in other actions. Rules 13 and Rules 23 allow matters to be placed on the trial list without notice, and can be tools of fraud and oppression.

with instructions, and for trial by jury of all of the Respondents.

JAMES D. SULLIVAN
Pro se

October 1969

APPENDICES

United States Court of Appeals
For the First Circuit

No. 7404.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT,
v.
EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT
and
T. FRANCIS KELLEHER,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

James D. Sullivan pro se.
Benjamin Goldman for Edward J. Choquette et al., appellees.
David S. Mortensen, with whom *John Kimball, Jr.*, and *Hale and Dorr* were on brief, for Johnathan G. Wells et al., appellees.

December 30, 1969.

PER CURIAM. This is an action for malicious prosecution, abuse of process and for relief from a judgment of eviction of the Newburyport District Court of Massachusetts.[1] Our jurisdiction is invoked under the civil rights

[1] This litigation has had a long history in the federal courts. Plaintiff first sued defendant Kelleher for damages for an alleged deprivation of his constitutional rights in that Kelleher, as clerk of the state court, entered a default judgment against him in the eviction action with knowledge that legal notice of the suit had not been

provisions, 28 U.S.C. § 1343 (1964) and 42 U.S.C. §§ 1983, 1985 (1964), and the diversity statute, 28 U.S.C. § 1332 (1964). Plaintiff appeals from the dismissal of his complaint by the district court, for, inter alia, failure to state a claim upon which relief can be granted. The essential facts are set out in the district court's opinion in *Sullivan I, supra,* note 1.

It is plain that an action for malicious prosecution will not lie unless there has been a termination of the prior proceedings in a manner favorable to the plaintiff. *Dangel* v. *Offset Printing, Inc.,* 342 Mass. 170 (1961); W. Prosser, Torts §§ 113-14 (3d ed. 1964). As the judgment of eviction rendered by the state court still stands, plaintiff has no cause of action unless relief is granted against that judgment. Hence, we proceed to consider that aspect of the case.

Plaintiff claims that service of process in the eviction action was constitutionally defective, that the state court therefore did not have jurisdiction, and that we should grant a "writ of error" to the state court, reversing or vacating the judgment. While we do not have the power to "annul, vacate, correct or otherwise alter the prior judgment" of a state court, we do have equitable jurisdiction

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given. That action was dismissed by the district court on grounds of judicial immunity and we affirmed. *Sullivan* v. *Kelleher,* 405 F.2d 486 (1st Cir. 1968). He next brought suit for breach of the lease of the premises from which he was evicted, abuse of process, and slander against defendants Choquette and Wells and one Jean MacDonald. The district court granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette,* 289 F.Supp. 780 (D. Mass. 1968), *appeal dismissed for want of prosecution,* No. 7253 (1st Cir., Feb. 21, 1969) [hereinafter cited as *Sullivan I*].

To the extent that this action states a claim for abuse of process, the district court was correct in dismissing it. Such a claim is plainly concluded by the decision in *Sullivan I* as well as barred by the statute of limitations. Moreover, the dismissal of the complaint as to defendant Kelleher was clearly proper, as his immunity from suit was conclusively determined by our decision in *Kelleher, supra.*

to grant relief from the effects of such a judgment in an appropriate case.[2] 7 J. Moore, Federal Practice ¶60.36 (2d ed. 1968). This is not, however, such a case.

Service of process in the state case was made by leaving the writ at the demised premises in accordance with Mass. G. L. A. ch. 223, § 31. Plaintiff received actual notice of service from his wife, who informed him of the contents of the writ over the telephone. In actions concerning rights in property within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); F. James, Civil Procedure §§ 12.1, 12.7, 12.11 (1965); Restatement of Judgments § 32, comments a, f, and g (1942); *see Wagner* v. *Wagner*, 293 F.2d 533 (D.C. Cir. 1961); *Schultz* v. *Walker*, 130 F.2d 907 (7th Cir. 1942). While some commentators have expressed doubts as to the constitutionality of service made by simply leaving process at the last and usual place of abode, the doubts have concerned the likelihood of the defendant not receiving actual notice of the action. James, *supra* § 12.11, at 650-51. Since plaintiff in this case had actual notice, we find no defect in the service of process. The district court was therefore correct in dismissing this aspect of the complaint for failure to state a claim and, since there has not been a favorable termination of the state eviction proceeding, the court was also correct in dismissing the malicious prosecution count.

Affirmed.

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[2] Equitable relief against the state judgment, under some circumstances, could arguably constitute a favorable termination of the prior suit for purposes of bringing an action for malicious prosecution. Since we do not grant relief against the state judgment, however, we express no opinion on the merits of this issue.

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United States Court of Appeals
For the First Circuit

No. 7183.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT,

v.

T. FRANCIS KELLEHER,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before ALDRICH, *Chief Judge*, WOODBURY,* *Senior Circuit Judge*, and COFFIN, *Circuit Judge*.

Harvey Glass, for appellant.
Benjamin Goldman, for appellee.

OPINION OF THE COURT.

December 24, 1968.

PER CURIAM. The appellant, alleging himself to be a "resident and domiciliary" of New Jersey, brought this action sounding in tort in the court below against the appellee alleging him to be a citizen of Massachusetts and formerly clerk of the District Court of Newburyport in that Commonwealth. Federal jurisdiction is asserted on diversity of citizenship and amount in controversy, Title 28 U.S.C. § 1332(a) (1), and on deprivation of a federally guaranteed right in violation of § 1 of the Civil Rights Act of 1871, 17 Stat. 13, now 42 U.S.C. § 1983.

The plaintiff seeks damages from the defendant basically on the ground that the court of which at the time he

* Sitting by Designation.

was clerk entered a default judgment evicting the plaintiff from his rented residence in Newburyport without giving him legal notice of the action, that is to say, by service of process at the "last and usual place of abode" without any further notice although it was well known that at the time the plaintiff was away from his home on an extended business trip to Florida.[1] The court below dismissed the plaintiff's complaint on the defendant's motion for summary judgment. We affirm.

We do not pause to consider the adequacy of the service of process or any other alleged error committed by the defendant as clerk of the Newburyport District Court but pass directly to the matter of judicial immunity.

For the soundest reasons of policy it has long been established that when a judge has general jurisdiction over the subject matter he is not civilly liable for acts done in the exercise of his judicial function. *Bradley* v. *Fisher*, 13 Wall. 335, 346 *et seq.* (1871). But this does not mean that judicial immunity hangs upon the determination of nice questions of jurisdiction which as the Court pointed out in *Bradley* v. *Fisher*, at page 352 can be "some of the most difficult and embarrassing" that a judicial officer may be called upon to consider and decide. The distinction which must be observed is "between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter." *Bradley* v. *Fisher*, supra 351.

Since the plaintiff concedes that the Newburyport District Court had general jurisdiction over the subject matter of the action brought in that court to evict him from his home, and since the immunity accorded to judges "extends to other officers of government whose duties are re-

[1] The plaintiff does not dispute that at the time the rented house in Newburyport was his "last and usual place of abode" or that his wife and children were then in residence, and he concedes that his wife notified him over the telephone of the process served at the abode.

lated to the judicial process," *Barr* v. *Matteo,* 360 U.S. 564, 569 (1959), it follows that the defendant cannot be held personally liable for any defects in service of process, if indeed there were such defects. The inclusion of opprobrious epithets, such as alleging that the judicial officer acted maliciously or corruptly, adds nothing of legal consequence to the complaint, *Bradley* v. *Fisher,* supra 351, reaffirmed, *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967), wherein the Court held that the settled common law principle of judicial immunity was not abolished by § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.

The judgment of the District Court is affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7253.

JAMES D. SULLIVAN,
Plaintiff, Appellant,

v.

EDWARD J. CHOQUETTE ET AL.
Defendants, Appellees.

ORDER OF COURT

Entered February 21, 1969

Plaintiff-appellant having taken no action in response to a motion of his counsel to withdraw, or to respond by February 17, 1969, to his duty to proceed in this court, and not having responded to motions of appellees to dismiss, filed February 4 and 14, respectively, for failure to prosecute diligently his appeal in which his attention was specifically called to his obligations and lack of interested counsel,

It is ordered that the appeal herein be, and the same hereby is, dismissed for lack of prosecution.

By the Court:

Roger A. Stinchfield
Clerk.

Enter:

Aldrich, Ch. J.

[cc: Messrs. Glass, Goldman and Kimball.]

APPENDIX D

CONSTITUTION OF THE UNITED STATES

Amendment V

(1 U. S. Stat. 21;
U. S. C. A. Const. Amend. V, p. 4)

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

(1 U. S. Stat. 21;
U. S. C. A. Const. Amend. XIV, p. 6)

Section one (1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

APPENDIX D

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

UNITED STATES STATUTES

28 USC 1332
Diversity in Citizenship; Amount in Controversy; Costs

(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000., exclusive of interests and costs, and is between

(1) Citizens of a different State
(2) Citizens of a State, and Foreign States or citizens or subjects thereof; and
(3) Citizens of different States and in which Foreign States or citizens or subjects thereof are additional parties.

28 USC 1343

The District Courts shall have original jurisdiction of any civil action authorized to be commenced by any person:

(1) to recover damages for injury to his person, property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

Appendix E

(2) to recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) to redress the deprivation, under the color of any State law, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) to recover damages or to secure equitable relief under any act of Congress providing for the protection of civil rights, including the right to vote.

28 USC 1651

(a) The Supreme Court and all Courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a Justice or Judge of a Court which has jurisdiction.

Appendix E

42 USC 1983
Civil Action for Deprivation of Rights

Every person, who, under color of any Statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC 1985

(2) If two or more persons in any State or Territory conspire to deter by force . . . . or having been such juror; or if two persons conspire for the purposes of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws,

(3). . . . the party so injured or deprived may have an action for recovery of the damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Appendix E

42 USC 1986
Same, Action for Neglect to Prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this Title are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all the damages caused by such wrongful act, which person by reasonable diligence could have prevented; and such damage may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . . .

APPENDIX F

GENERAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS

Chapter 186, Section 11 DETERMINATION OR LEASE FOR NON-PAYMENT OF RENT. Upon the neglect or refusal to pay the rent due under a written lease, fourteen days notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease, unless the tenant, at least four days before the return day of the writ, in an action by the landlord to recover the possession of the premises, pays or tenders to the landlord or to his attorney all rent then due, with interest and costs of suit. MGLA C 186 s 11.

Chapter 223, Section 31 SUMMONS: LEAVING AT THE LAST KNOWN ADDRESS, ETC. If the summons is not served personally on the defendant, the original or a copy, as the case may be, shall be left at his last and usual place of abode, if he has any in the Commonwealth known to the officer. If he has none, it shall be left with his tenant, agent, or attorney, if he has any within the Commonwealth known to the officer. If he has no such last and usual place of abode, and no tenant, agent or attorney, no service on him shall be required except as provided in the three following sections. MGLA C. 223 s 31.

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Chapter 223, Section 34. FURTHER NOTICE TO ABSENT DEFENDANT. If the defendant is out of the Commonwealth, or if his residence is not known to the officer, and no personal service is made on him or on his agent appointed under Section five of Chapter two hundred and twenty seven, he shall, in addition to the service herein prescribed, be entitled to further notice of the action as provided in said Chapter. MGLA C. 223 s 34.

Chapter 223, Section 84. DEFECTIVE SERVICE OF PROCESS; NECESSITY OF FURTHER SERVICE. If the service of a writ, process or order is defective or insufficient, the Court or tribunal to which it is returnable may, upon motion of the Plaintiff or Petitioner, issue further writs, processes and orders, which shall be served in such manner as may be therein directed; and upon due service thereof, the Court or tribunal shall thereby acquire the same jurisdiction of the subject and the parties as it would have obtained if such service had been made in pursuance of the original writ, process or order. The action, suit or proceeding shall be continued from time to time until such service is made. MGLA C. 223 s 84.

Chapter 227, Section 7. NOTICE. If a defendant in an action in the supreme judicial or superior court is absent from the Commonwealth or his residence is unknown to the officer serving the writ, and no personal service has been made on him or his agent appointed

under Section five, or if the service of the writ is defective or insufficient by reason of a mistake of the Plaintiff or officer as to where or with whom the summons or copy ought to have been left, the Court, upon suggestion thereof by the Plaintiff, shall order the action to be continued until notice of the action is given in such manner as it may order. If the property of an absent defendant has been attached and the residence of such defendant is known to the Plaintiff and no legal service can be made upon him within the Commonwealth, except by publication, the Court may order personal service to be made on him in such manner as it may direct and, upon proof that service has been made, such defendant shall be held to answer to the action. If the defendant does not appear, the Court may order the action continued and further notice given to him in such manner as it may direct. MGLA C. 227 s 7.

Chapter 227, Section 8. DEFAULT. If, after such notice, the defendant does not appear within twenty-one days after the day specified thereof, a default shall be entered and judgment rendered against him as provided in Section one. MGLA C. 227 s 8.

Chapter 231, Section 58. NOTICE OF DEFAULT OR DECREE PRO CONFESSO. Upon entry of a default or non-suit in an action at law or of an interlocutory decree in equity taking a bill pro confesso, the Clerk of the Court shall forthwith give written notice thereof, in such manner as the Court by rule shall direct,

to the attorney of record, if any, of each party against whom such default, non-suit or decree is entered. If a party has no attorney of record, and if, in case of the entry of a default or interlocutory decree is as aforesaid, the officers return does not show that personal service of the writ, bill, or petition or complaint or order therein, as the case may be, has been made upon him, the notice shall be given to the party. MGLA C. 231 s 58.

Chapter 235, Section 2. ENTRY OF JUDGMENTS; DISTRICT COURTS. Judgments in civil actions and proceedings ripe for judgment in District Courts shall be entered at ten o'clock in the forenoon on Friday of each week, but if a legal holiday occurs on Friday, at ten o'clock in the forenoon of the Thursday preceding; or it may be entered at any time in a case ripe for judgment upon notice and motion. MGLA C. 235 s 2.

Chapter 239, Section 1. PERSONS ENTITLED TO SUMMARY PROCESS. If a forcible entry into land or tenements has been made, if a peaceable entry has been made and the possession is unlawfully held by force, if the lessee of land or tenements or a person holding under him holds possession without right after a determination of a lease by its own limitation or by notice to quit or otherwise, or if a person has acquired title to land or tenements by purchase, and the sellor or any person holding under him refuses to surrender possession thereof to the buyer, or if a tax

title has been foreclosed by decree of the land court, or if a purchaser under a written agreement to purchase, is in possession of land or tenements beyond the date of agreement without taking title to said land or tenements beyond the date of the agreement without taking title to said land as called for by said agreement, the person entitled to the land may recover possession thereof under this chapter . . . . As amended St. 1941 C. 242 s 1; St. 1952, C. 151 s 1; St. 1953 C. 106. MGLA C. 239 s 1.

Chapter 239, Section 2. JURISDICTION; VENUE; FORM OF WRIT. Such person may take from the Superior Court or from the District Court a writ in the form of an original summons, which shall summon the defendant to answer to the Complaint of the Plaintiff that the Defendant is in possession of the land or tenements in question, describing them, which he holds unlawfully and against the right of the Plaintiff; and no other declaration shall be required. The action shall be brought in the county, and if brought in a district court, in the judicial district, where the land or tenements lie. MGLA C. 239 s 2.

APPENDIX G

RULES OF THE DISTRICT COURTS OF THE COMMONWEALTH OF MASSACHUSETTS
(effective January 1, 1965)

In accordance with the provisions of G. L. C. 218, ss 21 and 43 as appearing in St. 1963 C 810 ss 3 and 6, the following rules are promulgated and made applicable to all the district courts, except the Municipal Court of the City of Boston, to take effect January 1, 1965.

Kenneth L. Nash,
Chief Justice of the
District Courts

Rule 3
GIVING OF NOTICE

A notice to a party required by or given in pursuance of these rules, or any statute relative to procedure not requiring a different notice, shall be in writing, and, except as otherwise permitted by Rule 8, shall be given to such party or his attorney or any of his attorneys by delivering the same to him personally, or by mailing the same postage prepaid, to him at his business address or the address entered under Rule 8.

A certificate of the person giving the notice shall be evidence thereof.

Appendix G

Rule 3 (continued)

This rule shall not apply to original process or notice to bring a party before the Court.

Rule 6
ENTRY OF CASES

Civil actions shall be entered on the return day. The Clerk shall accept all writs, processes notices and citations at any time within three days prior to the date on which they are returnable, and shall enter the same on the return day.

Actions may be entered after the return day, on or before the following Friday, except when Friday falls on a legal holiday, in which case the time for entering actions late shall expire on the Thursday following the return day, upon such terms as the Court may impose. Notice of such late entry shall be given to each of the other parties on or before said Friday. Unless it shall appear on the Monday following the return day that such notice has been given and such terms complied with, in any action so entered late, it shall be stricken from the docket, unless the Court shall allow further time for notice.

No action shall be entered before the writ is filed, except by order of the Court.

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Rule 8
APPEARANCES

The name, post office address and telephone number of the attorney for every party, or of the party if no attorney appears for him, shall be entered upon the docket as they appear upon the papers or paper constituting the appearance, or upon some paper transmitted to the Clerk therein. Where no address of the attorney or party, as the case may be, appears upon the docket or papers, notice to such party may be given by posting the same publicly in the Clerk's Office or in a room, hall or passage adjacent thereto. The Clerk upon request shall post the same and shall make a docket record of said posting.

Appearances by a firm or by several attorneys shall at all times be accompanied by the designation of one as a trial attorney.

Substitution of attorneys shall be entered by the Clerk upon the docket at any time after the appearance, on written request filed in the particular case. The Court and parties, until substitution is entered, and thereafter until all parties have notice thereof, may rely on action by, and notice to, any attorney previously appearing, and on notice at an address previously appearing on the papers.

Any appearance shall constitute a general appearance unless the purposes thereof are specified in writing.

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Rule 10
COPIES TO ADVERSE PARTIES

When any pleading or motion is filed after the declaration, or when any bill of particulars, or specifications, or answers to Interrogatories are filed, a copy thereof shall be given not later than the day of filing to the adverse parties in the manner provided for notices by Rule 3.

After the entry the Plaintiff, upon written demand of the Defendant, shall furnish to the Defendant a copy of the declaration within three days after receipt of such demand.

In case of failure to comply with this rule, the Court may entertain a motion to strike such paper from the files, and may allow such motion to strike or deny it and may in either case impose terms against the party at fault.

Notice of the removal of an action from a District Court to the Superior Court shall be given forthwith to the adverse party by the Clerk.

Rule 12
AMENDMENTS

A motion for leave to amend shall contain or be accompanied by the proposed amendment.

If a demurrer is sustained, and leave to amend is not denied, a case shall be deemed

Appendix G

Rule 12 (continued)

ripe for judgment only after seven days from the sustaining of the demurrer, or such other time as the Court may allow for amendment, and then only after the disposition of any motion to amend the pleadings demurred to, filed within such time. After the expiration of such time no motion to amend such pleadings shall be filed with the Court without leave.

An amendment of the pleadings agreed to in writing by the adverse party shall take effect when filed without any action by the Court.

Rule 13
FILING OF PLEADINGS SUBSEQUENT TO THE DECLARATION

Each party other than the Plaintiff, including herein a trustee in scire facias or any claimant, shall, unless some other period is prescribed in statute, and except in actions of summary process, file his motion to dismiss, answer in abatement, demurrer, plea or answer on or before the Thursday after the return day of the writ, notice, or other process by which he or his property is brought before the Court to answer in the action, or within three days after the entry and notice thereof in case of late entry, and in case of failure of such party to comply with these provisions, the Clerk shall without further order enter a default with respect to him.

Appendix G

Rule 13 (continued)

Each defendant in a summary process action shall, unless some other period is prescribed by statute, file his answer or other pleadings on or before the Wednesday after the return day of the writ by which such action is commenced, or within two days after entry and notice thereof in case of late entry, and in case of failure by such defendant to comply with these provisions, the Clerk shall without further order enter a default with respect to him. Summary process actions shall be placed, without notice, on the trial list on the Thursday next after issue is joined, unless the Court otherwise orders.

Rule 13 (Answers to Subsequent Pleadings)

An answer shall deny specifically and separately each substantial fact alleged which is in good faith intended to be denied; or it shall with equal particularity declare the defendant's ignorance of the fact . . . . .

Rule 14
NON-SUITS AND DEFAULTS

Notice of default or non-suit thereafter shall be given by the Clerk forthwith to the attorney of record of the party against whom such action is taken in the manner provided for notice to a party, and if there be no such attorney of record, then to such party. But no notice need be given to a party personally served with pro-

Appendix G

Rule 14 (continued)

cess whose appearance has not been entered upon the docket. The fact of such notice shall be entered on the docket.

Such case shall not be deemed ripe for judgment except in summary process actions until the expiration of seven days after such action of which notice is required.

A non-suit or default shall not, except the Court otherwise order, be removed after the day on which it is entered except (a) by the operation of some condition thereof, (b) by written agreement of the parties filed with the Clerk before final judgment, or (c) upon motion supported by affidavit of the facts relied on in the prosecution or defense, notice to the adverse party, and such proof as the Court may require that a prosecution or defense is intended in good faith.

Rule 22
MOTIONS

Motions must be in writing and filed before being heard or placed upon a list for hearing, unless otherwise ordered by the Court.

At least three days' written notice of all motions shall, unless the Court orders otherwise, be given to the adverse party or his attorney.

Appendix G

Rule 22 (continued)

If the motion so marked shall not be presented by the party making the same it may be presented by the opposing party and acted upon. Each motion shall contain a statement of the time and the manner of giving the notice required.

The Court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or are apparent upon the records and files, or are agreed to and stated in writing signed by the attorneys for the parties interested.

The Court reserves the right, in its discretion, notwithstanding anything contained in these rules, to hear motions and other interlocutory matters, in open court or in chambers, at such time and upon notice, if notice is required, and such proof of notice, as it may see fit.

Rule 23
TRIAL DAYS AND TRIAL LISTS

The several courts shall by rule applicable to their local conditions designate trial days for the hearing of civil actions, subject to all statutory provisions affecting the same.

Summary process actions shall be placed, without notice, upon the trial list on the Thursday next after issue is joined unless the Court

Appendix G

Rule 23 (continued)

otherwise orders. Writs in summary process entered late shall proceed as in other actions.

A party desiring to place a case upon the trial list shall give to all other parties entitled to be heard or their attorneys notice thereof and filed with the Clerk a request that the case be placed on the trial list and also a certificate of the service of such notice at least six days before the trial day. No case shall be placed upon the trial list wherein the issues have not been joined. The fact that Interrogatories have not been Answered or that a commission to take a Deposition has not been returned or that a motion remains unheard, shall not prevent the placing of a case upon the trial or hearing list or upon any short list, and shall not delay the trial or hearing, except by special order of the Court. The Clerk shall make up a trial list and post the same in his office for examination at least three days before the trial day, listing the cases and the names of the attorneys appearing therein in the inverse order of the numbers of such cases on the docket, unless the Court shall otherwise order.

At the call of the trial list or when a case comes on for trial any party who is not present and ready to proceed shall at the request of the other party present be non-suited or defaulted or the case be otherwise disposed of as the Court may order. A case once on the trial list

Appendix G

Rule 23 (continued)

and not ready when reached shall be stricken from the list or otherwise disposed of as the Court may order. A case stricken from the list shall not again be placed on the list for a trial day within four weeks, except by leave of the Court.

Nothing in these rules shall prevent the Court from postponing or specially assigning any case or continuing it to another day.

Rule 36
ENTRY OF JUDGMENT

Judgments in civil actions and proceedings ripe for judgment shall be entered by the Clerk, unless the Court otherwise orders, in accordance with General Law Chapter 235, Section 2. The Court may order judgment to be entered at other times. On written agreement of the parties filed with the Clerk judgment may be entered by the Clerk on any day, without further order.

An action or proceeding shall not be ripe for judgment until the time for filing a draft report has expired; nor while a case is reserved for report; nor until the time for claiming appeal is expired; nor in a case of non-suit or default if notice is required except in summary process cases, until the expiration of seven days from such non-suit or default; nor in case of notice to the Clerk that a party desires to be

Appendix G

Rule 36 (continued)

present at the taxation of costs, until the costs have been taxed and finally determined, unless judgment and execution are awarded under General Law Chapter 261, Section 21.

Judgments after rescript from the Supreme Judicial Court shall not be entered by the Clerk as of course until the time for entering judgment next following the fourth day after the receipt of the rescript.

In an action against parties severally liable upon a written contract, wherein some of the defendants are defaulted and others appear, the Clerk may enter judgment and issue execution against the parties defaulted as if they had been sole defendants; and the case shall go forward against the parties appearing as in other contested cases.

When a reservation as to costs is made it shall not operate to delay judgment, but the party in whose favor it is made shall have the amount fixed before the case is ready for judgment, or lose the benefit of such reservation.

Rule 41
CLERK, PAPERS

The Clerk shall be answerable for all records and papers filed in the Court or in his office, and they shall not be taken from the custody of the Clerk unless in the cases authorized by

Appendix G

Rule 41 (continued)

statute or by special order of the Court, but parties may at all times have copies.

Rule 58
DOCKET --- PERSONNEL DEFINED

The docket shall consist of cards, envelopes or folders and such other documents as may be incorporated therein by reference. Nothing shall be deemed part of the record except the docket entries. Any written papers delivered to the Clerk shall be merely authority for the Clerk to enter the substance thereof on the docket, and such papers need not be filed or preserved. The word "Clerk" in these rules shall include an assistant clerk, Clerk or assistant clerk pro tempore. The word attorney in these rules shall mean an attorney at law, a person specially authorized in writing to prosecute or defend the claim, on of a number of partners or joint plaintiffs acting for all, or an officer, manager or local manager of a corporation acting for it. Notice to such attorney for a party shall be equivalent to notice to such party.

Rule 72
CLERKS' OFFICE HOURS

The office of the Clerk shall be open in each District Court from 8:30 AM to 4:00 PM Monday through Friday; and 8:30 AM to 12:00 noon Saturdays.

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 1345

JAMES D. SULLIVAN,
PETITIONER,
v.
EDWARD J. CHOQUETTE
HARVEY BEIT
JONATHAN G. WELLS III
and
T. FRANCIS KELLEHER,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1345

JAMES D. SULLIVAN,
PETITIONER,

v.

EDWARD J. CHOQUETTE
HARVEY BEIT
JONATHAN G. WELLS III
and
T. FRANCIS KELLEHER,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Respondents oppose the petition and pray that a writ of certiorari will not issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the case of *James D. Sullivan* v. *Edward J. Choquette et al.*, on December 30, 1969.

Opinions Below

The United States District Court for the District of Massachusetts wrote a Memorandum of Decision and Order of Dismissal granting respondents' motions to dismiss. That opinion has not been reported. It was not included in petitioner's Petition but is printed as Appendix A to this brief.

The opinion of the United States Court of Appeals for the First Circuit is reported at 420 F.2d 674. It is also printed as Appendix B to this brief.

Companion Cases

This petition is the latest of a long series of actions brought by petitioner against the respondents and others. Petitioner has reproduced some but not all of these in the Petition (p. 2). The complete list, which is relevant to an understanding of the Petition and of this brief, is as follows:

The District Court for the District of Massachusetts on June 26, 1968 wrote an opinion allowing the respondent Kelleher's motion to dismiss on the ground of judicial immunity. *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C. That opinion has not been reported.

The United States Court of Appeals for the First Circuit affirmed in an opinion reported in 405 F.2d 486. That opinion is printed at page 4a in the Appendices to the Petition.

In a second action the United States District Court for the District of Massachusetts granted the respondent Wells' motion for summary judgment. *Sullivan* v. *Choquette*, Civil Action No. 67-961-C. The opinion is reported in 289 F.Supp. 780.

The United States Court of Appeals for the First Cir-

cuit dismissed petitioner's appeal on February 21, 1969 for lack of prosecution. *Sullivan* v. *Choquette*, No. 7253.

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Statutes Involved

42 U.S.C. § 1983 *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985 *Conspiracy to interfere with civil rights — Preventing officer from performing duties*

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending any such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986 *Same; action for neglect to prevent*

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Mass. G.L. c. 260, § 2A *Statute of Limitations.*

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within two years next after the cause of action accrues.

Questions Presented

1. Did the Court of Appeals correctly hold that petitioner's complaint was barred by the statute of limitations?
2. Did the Court of Appeals correctly hold that petitioner's complaint, to the extent that it alleged a claim for abuse of process, was barred by res judicata?
3. Did the Court of Appeals correctly hold that petitioner's complaint, to the extent that it alleged a claim for malicious prosecution, failed to state a cause of action upon which relief could be granted?
4. Did the Court of Appeals correctly hold that, since petitioner without dispute received actual notice of the pendency of a state court action, there was no constitutional defect in the service of process so as to warrant a federal court's granting equitable relief from the effects of the state court's judgment?

Statement of the Case

Petitioner commenced this action in the United States District Court for the District of Massachusetts on October 30, 1968. The Complaint purported to state claims for abuse of process and for malicious prosecution. The complaint also purported to state a claim under the Civil Rights Act of 1871. 42 U.S.C. §1983, 1985 and 1986.

The respondent Kelleher was sued in his capacity as Clerk of the District Court of Newburyport, Massachusetts. The respondent Choquette was sued as the former lessor

to Sullivan of a house in Newburyport. The respondents Wells and Beit are law partners in Newburyport. No facts were alleged pertaining to the respondent Beit except that he was associated with Wells in the practice of law.

The District Court allowed motions to dismiss filed by all respondents on May 27, 1969. See Appendix A hereto.

The petitioner appealed, and the United States Court of Appeals for the First Circuit on December 30, 1969 affirmed the decision below. See Appendix B hereto.

The complaint below was the latest of a long series of actions brought in the federal courts by petitioner, *pro se*, against the various respondents. A brief description of those suits is essential to a description of this case, and to respondent's argument that the petition for certiorari should be denied.

Plaintiff first sued respondent Kelleher for damages for deprivation of petitioner's constitutional rights in that Kelleher, as clerk of the state court, allegedly entered a default judgment against petitioner in an eviction action with knowledge that legal notice of the suit had not been properly given. The United States District Court for the District of Massachusetts dismissed the complaint on June 26, 1968 on the ground of judicial immunity. *Sullivan* v. *Kelleher,* Civil Action No. 67-919-C. The Court of Appeals affirmed. *Sullivan* v. *Kelleher,* 405 F.2d 486 (1st Cir. 1968).

Petitioner also filed a petition for a writ of error in the Superior Court for Essex County, Massachusetts on December 1, 1967, which was dismissed for lack of jurisdiction on October 14, 1968. *Sullivan* v. *Choquette,* Essex Superior Court No. 139,788. No appeal was ever taken from that judgment. (See Court of Appeals Appendix, p. 133).

Petitioner also brought suit for abuse of process, malicious prosecution, slander and breach of the lease of the premises from which he had been evicted, against respon-

dents Choquette and Wells and one Jean MacDonald. The District Court on September 30, 1968 granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette,* 289 F.Supp. 780 (D.Mass. 1968), appeal dismissed for want of prosecution, No. 7253 (1st Cir., Feb. 21, 1969).[1]

The petitioner then instituted the present action, again alleging abuse of process, malicious prosecution and violation of his civil rights.

There is presently pending in the Massachusetts Supreme Judicial Court for Essex County a petition for a writ of error, instituted by petitioner on February 7, 1970 — since the time of the Court of Appeals decision here complained of — against the respondent Choquette and the Justices of the District Court of Newburyport, involving the same subject matter. *Sullivan* v. *Choquette et al.,* Supreme Judicial Court for Essex County No. 2663.

Through all of petitioner's repeated suits against the respondents, there has run a common, recurring thread of allegations. In the case below petitioner alleged that he is a resident of New Jersey; that in July 1965 he entered into a written lease with the respondent Choquette for one year's occupancy of a house in Newburyport; that in November 1965, while petitioner was absent from Massachusetts on business, Choquette commenced an action of eviction against petitioner for non-payment of rent in the District Court of Newburyport, Massachusetts, and caused a four-

[1] Petitioner has brought suit on behalf of his minor daughter against the four respondents and MacDonald seeking to perpetuate the testimony of some seventeen persons including respondents, in anticipation of a tort action allegedly arising from events connected with the transaction at bar. On May 27, 1969 the District Court granted motions by all defendants to dismiss that petition for failure to state a claim and for failure to show, as required by Rule 27(a)(1), Fed. R. Civ. P., that petitioner was presently unable to bring or cause the cause of action to be brought. *Kimberly Sullivan* v. *Edward J. Choquette et al.,* Civil Action No. 68-984-G (D.Mass.).

teen-day notice to quit to be served upon petitioner; that a Deputy Sheriff made service of the writ or summary process (eviction) by leaving a copy of the writ at the rented house,[2] which was the petitioner's last and usual place of abode and where petitioner's wife found it; that petitioner's wife telephoned petitioner in Florida and advised him of the pendency of the action; that petitioner wrote to the Court from Florida stating that he viewed the service as improper and would accept service only by mail at an address in California (Court of Appeals Appendix, pp. 9, 30); that petitioner then returned to Massachusetts and was physically present in Newburyport between December 14 and December 20, 1965; that the case was continued; and that, the defendant having failed to answer or otherwise appear in the case, the state court summary process action terminated in a judgment for Choquette on December 30, 1965 and the issuance of an execution for petitioner's eviction on January 7, 1966 (Court of Appeals Appendix, pp. 9, 56-59).

The complaint below also alleged that, on January 29, 1966, in exchange for a five-day extension, the petitioner, then represented by counsel, signed a written agreement that he would voluntarily quit the premises within that period; and that the premises were in fact vacated by that time (Court of Appeals Appendix, pp. 13-14).

The complaint is replete with additional allegations which, in substance, sought to challenge the underlying procedure in the District Court of Newburyport and which describe unrelated and irrelevant events. No factual allegations were addressed to actions of the respondent Beit except broad charges of conspiracy.

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[2] With each retelling, petitioner's version of the story becomes embellished. In Paragraph V of the Complaint (Court of Appeals Appendix, P. 7) petitioner states that service was made by leaving the notice "in the storm porch enclosure". In his present petition (P. 8) he for the first time says the notice was found "lying on the front lawn of the premises".

All four defendants filed motions to dismiss the complaint, and the District Court granted all such motions on May 27, 1969. See Appendix A. The District Court's decision was based on four separate grounds:

1. That the suit, whether in tort or for violation of the Civil Rights Act, was barred by the statute of limitations;
2. That the suit was barred by the doctrine of res judicata in view of judgments in several earlier actions involving the same parties;
3. That the complaint failed to state a cause of action upon which relief could be granted; and
4. That, as to the respondent Kelleher, the suit was barred by the doctrine of judicial immunity.

In view of its decision the District Court, because of lack of independent jurisdiction, did not rule on the respondent Kelleher's counterclaim for an order enjoining petitioner from bringing additional suits arising from the transaction at bar.

The Court of Appeals affirmed on December 30, 1969. See Appendix B. This petition seeks to challenge that decision.

Argument

This case is not appropriate for review by this court on a petition for certiorari for several compelling reasons.

1. This case presents no important or significant question of law to be resolved by this Court. The issues which petitioner seeks to raise do not involve questions which affect persons other than the litigants. The case, rather, is uniquely confined to the narrow, factual allegations of this particular litigation.

This is not a case involving a conflict between the

decisions of more than one circuit, nor does it concern a ruling below which conflicts with a prior decision of this court. No question of important constitutional dimension is raised. The case, instead, involves comparatively clear-cut issues as to the statute of limitations, judicial immunity and the *res judicata* effect of prior decisions on the identical questions.

2. There is presently pending in the Massachusetts Supreme Judicial Court for Essex County a petition for a writ of error commenced by petitioner against the respondent Choquette and others. That action involves an attack against the lower state court proceeding from which petitioner's alleged grievance — underlying this action and all his earlier actions — stems. It involves the same basic challenge to the underlying state court action which petitioner sought to raise in the lower federal courts, as indicated by the statement in Paragraph II of the Complaint that petitioner "is seeking a judgment equivalent to the Massachusetts State Court 'Writ of Error', primarily", and as buttressed by his assertion at page 18 of his brief in the Court of Appeals:

> "These errors are only correctable by a Writ of Error on the state latitude . . . "

Thus petitioner is now having his day, once again, in the state court, and this court with its crowded docket should decline to hear this case.

In that connection, this court should also consider that the present petition and supporting record are so cluttered with vague and confusing material that an inordinate demand would be placed on this Court were it to grant the petition.

3. The decisions below were clearly correct, and were based on several compelling grounds, any one of which justifies this court's declining to grant the petition.

(a) RES JUDICATA. The courts below correctly held that petitioner was barred from maintaining this action against the respondents for abuse of process and malicious prosecution by the *res judicata* effect of the earlier proceeding in which essentially the same grounds for relief were asserted against the respondents. In *Sullivan* v. *Choquette*, 289 F.Supp. 780, 782-83 (D.Mass. 1968), the district court ruled that these claims were insufficient as a matter of law and entered judgment for the respondent Wells.

"A judgment is an absolute bar to a subsequent action on the same claim." *United States* v. *International Building Co.*, 345 U.S. 502, 504 (1953). A judgment also serves as a bar to later actions on the same claim against persons (in this instance, respondent Beit) who were in privity with the parties to the prior suit. *Mendez* v. *Bowie*, 118 F.2d 435, 440 (1st Cir. 1941). Thus the court below was correct in ruling that the prior judgment barred this action insofar as the complaint alleged abuse of process and malicious prosecution.

The courts below likewise correctly held that the prior judgment barred the allegations in this suit that petitioner's civil rights were violated. A prior judgment serves as a bar to a subsequent suit which, although differing in form, is identical in substance. *Astron Industrial Assoc.* v. *Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968); see *Fiumara* v. *Sinclair Refining Company*, 385 F.2d 395 (3rd Cir. 1967). Some of the various tests advanced for determining whether subsequent actions are identical were outlined in *Acree* v. *Air Line Pilots Assoc.*, 390 F.2d 199, 201 (5th Cir. 1968):

> "Is the same right infringed by the same wrong? Would a different judgment in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?"

See *Astron Industrial Assoc.* v. *Chrysler Motors Corp.*, supra, and cases therein cited at 961-62. By any of these tests, petitioner's effort to breathe fresh air into his now exhausted claim must fail. The courts below correctly held that *res judicata* also barred the asserted claim of a cause of action under the Civil Rights Act.

By the same token, the courts below properly held that petitioner's claims against the respondent Kelleher were barred by the rulings that he was protected by the doctrine of judicial immunity, as had previously been held in the case of *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C, affirmed, *Sullivan* v. *Kelleher*, 405 F.2d 486 (1st Cir. 1968).

(b) STATUTE OF LIMITATIONS. The courts below were clearly correct in ruling that this action was barred by the statute of limitations.

The causes of action asserted against the respondents sought recovery for abuse of process and for malicious prosecution, both of which are torts under Massachusetts law. *Ledgehill Homes, Inc.* v. *Chaitman*, 348 Mass. 777 (1964); *Quaranto* v. *Silverman*, 345 Mass. 423 (1963); *Hubbard* v. *Beatty & Hyde*, 343 Mass. 258 (1961). The Massachusetts statute of limitations applicable to actions in tort, Mass. G.L. c. 260, §2A, establishes a limitation period, absent specific exceptions not here relevant, of two years after the cause of action accrues. The causes of action here accrued, at the latest, on February 4, 1966 — the last date complained of in the complaint. Yet the complaint in the present action was not filed until more than two years later, on October 30, 1968. Accordingly, the district court was correct in ruling that Mass. G.L. c. 260, §2A barred so much of the complaint as alleged abuse of process and malicious prosecution.

Petitioner's complaint also purported to assert a cause of action under the Civil Rights Act of 1871. It is well-settled, however, that actions brought under the Civil

Rights Act are governed by the applicable state statute of limitations. *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914); *Francis* v. *Lyman*, 108 F.Supp., 884, 885 (D.Mass. 1952), *affirmed sub nom. Francis* v. *Crafts*, 203 F.2d 809 (1st Cir. 1953), cert. denied, 346 U.S. 835 (1953). Thus the district court below correctly ruled that the two-year statute of limitations of Mass. G.L. c. 260, §2A also barred any cause of action under the Civil Rights Act.

(c) FAILURE TO STATE A CLAIM. The Court of Appeals was clearly correct, as was the district court in an earlier proceeding, *Sullivan* v. *Choquette*, 289 F.Supp. 780, 782 (D.Mass. 1968), in ruling that petitioner's complaint failed to state a cause of action for malicious prosecution. There is no allegation that the prior proceedings terminated in a manner favorable to plaintiff, an indispensable element of the tort. *Dangel* v. *Offset Printing, Inc.*, 342 Mass. 170 (1961).

Likewise, the courts below rightly held that the complaint failed to state a cause of action for abuse of process, as had another judge of the district court in the earlier decision of *Sullivan* v. *Choquette*, 289 F.Supp. 780, 782-83 (D.Mass. 1968), for there was no allegation that the process here was used for some ulterior motive other than that for which it was intended. *Gabriel* v. *Borowy*, 324 Mass. 231, 236 (1949); *Noyes* v. *Shanahan*, 325 Mass. 601, 605 (1950); *Ross* v. *Peck Iron & Metal Company*, 264 F.2d 262, 268 (4th Cir. 1959).

The district court below was also plainly correct in ruling that the case failed to state an actionable claim under the Civil Rights Act.

The courts below were justified in ruling that the complaint failed to state a claim based upon defects in service of process. There has never been any dispute but that petitioner here actually received notice of the pendency of the state court action, or that he had in fact returned

to Massachusetts long prior to the entry of judgment against him on December 30, 1965.

For this reason, the Court of Appeals was also clearly correct in ruling that petitioner's case did not justify the exercise of equitable jurisdiction to relieve petitioner from the effects of the state court judgment.

Conclusion

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

May 6, 1970

BENJAMIN GOLDMAN
Attorney for Respondents
Choquette and Kelleher
JOHN F. COGAN, JR.
Attorney for Respondents
Wells and Beit

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 68-983-G

Civil Action No. 68-983-G

JAMES D. SULLIVAN,

PLAINTIFF

v.

EDWARD J. CHOQUETTE ET AL.,

DEFENDANTS

MEMORANDUM OF DECISION AND ORDER OF DISMISSAL

May 27, 1969

GARRITY, J. This case arises upon plaintiff's complaint against four individual defendants brought for the stated purpose of effecting reversal of a writ of summary process entered by the Newburyport District Court and for damages allegedly arising from the fraudulent issuance and procurance of the writ. The court presently has before it various motions, including motions by each defendant to dismiss the complaint and a motion by the plaintiff for summary judgment on defendant Kelleher's counterclaim for an order enjoining plaintiff from bringing additional suits arising from the transaction at bar.

The facts upon which this complaint is premised have been before this court twice previously[1] and are reported in *Sullivan* v. *Choquette*, D. Mass., 1968, 289 F.Supp. 780. For the purposes of consideration of the defendant's

[1] In *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C, defendant's motion to dismiss was allowed on June 26, 1968, on the ground that defendant was judicially immune. The judgment was affirmed, *Sullivan* v. *Kelleher*, 1 Cir., 1968, 405 F.2d 486.

In *Sullivan* v. *Choquette*, Civil Action No. 67-961-C, defendants' motions to dismiss were allowed on September 30, 1968, reported at 289 F.Supp. 780. Appeal docketed, No. 7253, 1 Cir., was dismissed for lack of prosecution on February 21, 1969.

presently pending motions, the facts alleged by the resisting party are, of course, assumed to be true.

I

Each defendant asserts multiple grounds in support of his motion for dismissal. Since the motions must be granted, only some of these grounds need be specifically discussed by the court.

1. *Statute of Limitations.* All defendants have moved to dismiss on the ground that the statute of limitations has run. This suit, whether in tort or for violation of the Civil Rights Act, 42, U.S.C. §§1983, 1985 and 1986, is governed by the applicable Massachusetts statute of limitations. The most analogous and applicable Massachusetts statute of limitations is that of Mass. G.L. c. 260, §2A, which provides a two-year limitation for all but certain specified actions which are not related to that at bar. Cf. *Mulligan* v. *Schlachter,* 6 Cir., 1968, 389 F.2d 231, *Henig* v. *Odorioso,* 3 Cir., 1967, 385 F.2d 491, cert. den. 390 U.S. 1016, rehearing den. 391 U.S. 929. Since the last of the defendants' acts complained of took place not later than February 4, 1966, this suit, which was filed on October 30, 1968, is barred by the statute of limitations.

2. *Judicial immunity.* Defendant Kelleher has moved to dismiss on the ground of judicial immunity. All of Kelleher's acts which are complained of where acts within the scope of his duties as clerk of the Newburyport District Court. Kelleher is therefore immune from suit on the ground of judicial immunity. *Sullivan* v. *Kelleher,* 1 Cir., 1968, 405 F.2d 486.

3. *Res judicata.* Each defendant has moved to dismiss on the ground of res judicata. The facts recited in the complaint in this case are identical to those in two suits in this court previously brought by plaintiff and dismissed.[2] Each defendant in this case was a defendant in one of those

[2] See footnote 1 above.

two cases except defendant Beit, who is joined here solely as a law partner of defendant Wells and who is not alleged to have otherwise been involved. The previous suit against defendant Kelleher (C.A. No. 67-919-G) was premised both in tort and under the Civil Rights Act of 1871, as is this case, and is therefore res judicata on all issues raised in this case against defendant Kelleher. The previous suit against defendants Choquette and Wells (C.A. No. 67-961-C) was brought in tort with jurisdiction based upon diversity of citizenship; that suit did not claim a cause of action under the Civil Rights Act of 1871. To the extent that plaintiff's claim is in tort for malicious prosecution or abuse of process, the judgment in that case (C.A. No. 67-961-C) is res judicata since it involves the identical cause of action and facts. Restatement of Judgments §50 (1942); 1B, Moore, Federal Practice, Para. 0.409(1) at 1005 (2nd ed. 1965). Plaintiff's claim against defendant Beit is barred to the same extent that it is against defendants Choquette and Wells by C.A. 67-961-C since his alleged involvement in a malicious prosecution or abuse of process is no more than derivative from that of defendant Wells. The remainder of this suit, plaintiff's claim under the Civil Rights Act of 1871 that defendants Choquette, Wells and Beit have by conspiracy prevented plaintiff from receiving due process of law in courts of the Commonwealth of Massachusetts, is of the same purport and substance as plaintiff's prior suit for malicious prosecution and abuse of process (C.A. 67-961-C) and therefore is also barred under the doctrine of res judicata. See *Mendez* v. *Bowie*, 1 Cir., 1941, 118 F.2d 435; see also 1B, Moore, Federal Practice, Para. 0.409(1) at 1005-1008 and Para. 0.410(1) and (2) at 1151-1184 (2nd ed. 1965); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 826-828.

4. *Failure to state a cause of action.* Plaintiff's complaint alleges that the defendants have conspired and act-

ed under the color of law to deprive plaintiff of his civil rights. "State proceedings do not become civil rights matters by generalized, not to mention unsupported, allegations . . . " *Ronan* v. *Stone*, 1 Cir., 1968, 396 F.2d 502, 503. There is in this complaint no statement of a claim as required by Fed. R. Civ. P. 8 to support plaintiff's allegation of a denial of his civil rights. Plaintiff's complaint, therefore, fails to state a cause of action upon which relief may be granted.

II

In view of the allowance of defendants' motions to dismiss, the motion of defendant Wells to dissolve attachment is granted, all other motions pending in this case are denied, and defendant Kelleher's counterclaim is dismissed for want of independent jurisdiction. Cf. *Strachman* v. *Palmer*, 1 Cir., 1949, 177 F.2d 427; see also *United Mine Workers* v. *Gibbs*, 1966, 383 U.S. 715.

So ordered.

(s) W. Arthur Garrity, Jr.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7404.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT
v.
EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT
and
T. FRANCIS KELLEHER,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
MCENTEE and COFFIN, *Circuit Judges*

James D. Sullivan pro se.
Benjamin Goldman for Edward J. Choquette et al., appellees.
David S. Mortensen, with whom *John Kimball, Jr.*, and *Hale and Dorr* were on brief, for Jonathan G. Wells et al., appellees.

December 30, 1969

PER CURIAM. This is an action for malicious prosecution, abuse of process and for relief from a judgment of eviction of the Newburyport District Court of Massachusetts.[1] Our

[1] This litigation has had a long history in the federal courts. Plaintiff first sued defendant Kelleher for damages for an alleged deprivation of his constitutional rights in that Kelleher, as clerk of the state court, entered a default judgment against him in the eviction action with knowledge that legal notice of the suit had not been given. That action was dismissed by the district court on grounds of judicial immunity and we affirmed. *Sullivan* v. *Kelleher*, 405 F.2d

jurisdiction is invoked under the civil rights provisions, 28 U.S.C. §1343 (1964) and 42 U.S.C. §§1983, 1985 (1954), and the diversity statute, 28 U.S.C. §1332 (1964). Plaintiff appeals from the dismissal of his complaint by the district court, for, inter alia, failure to state a claim upon which relief can be granted. The essential facts are set out in the district court's opinion in *Sullivan I, supra,* note 1.

It is plain that an action for malicious prosecution will not lie unless there has been a termination of the prior proceedings in a manner favorable to the plaintiff. *Dangel* v. *Offset Printing, Inc.*, 342 Mass. 17 (1961); W. Prosser, Torts §§113-14 (3rd ed. 1964). As the judgment of eviction rendered by the state court still stands, plaintiff has no cause of action unless relief is granted against that judgment. Hence, we proceed to consider that aspect of the case.

Plaintiff claims that service of process in the eviction action was constitutionally defective. that the state court therefore did not have jurisdiction, and that we should grant a "writ of error" to the state court, reversing or vacating the judgment. While we do not have the power to "annul, vacate, correct or otherwise alter the prior judgment" of a state court, we do have equitable jurisdiction to grant relief from the effects of such a judgment in an appropriate case.[2] 7 J. Moore, Federal Practice ¶60.36 (2nd ed. 1968). This is not, however, such a case.

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486 (1st Cir. 1968). He next brought suit for breach of the lease of the premises from which he was evicted, abuse of process, and slander against defendants Choquette and Wells and one Jean MacDonald. The district court granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette*, 289 F.Supp 780 (D. Mass. 1968), *appeal dismissed for want of prosecution*, No. 7253 (1st Cir., Feb. 21, 1969) [hereinafter cited as *Sullivan I*].

To the extent that this action states a claim for abuse of process, the district court was correct in dismissing it. Such a claim is plainly concluded by the decision in *Sullivan I* as well as barred by the statute of limitations. Moreover, the dismissal of the complaint as to defendant Kelleher was clearly proper, as his immunity from suit was conclusively determined by our decision in *Kelleher, supra.*

[2] Equitable relief against the state judgment, under some circum-

Service of process in the state case was made by leaving the writ at the demised premises in accordance with Mass. G.L.A. ch. 223, §31. Plaintiff received actual notice of service from his wife, who informed him of the contents of the writ over the telephone. In actions concerning rights in property within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); F. James, Civil Procedure §§12.1, 12.7, 12.11 (1965); Restatement of Judgments §32, comments a, f, and g (1942); see *Wagner* v. *Wagner*, 293 F.2d 533 (D.C. Cir. 1961); *Schultz* v. *Walker*, 130 F.2d 907 (7th Cir. 1942). While some commentators have expressed doubts as to the constitutionality of service made by simply leaving process at the last and usual place of abode, the doubts have concerned the likelihood of the defendant not receiving actual notice of the action. James, *supra* §12.11, at 650-51. Since plaintiff in this case had actual notice, we find no defect in the service of process. The district court was therefore correct in dismissing this aspect of the complaint for failure to state a claim and, since there has not been a favorable termination of the state eviction proceeding, the court was also correct in dismissing the malicious prosecution count.

Affirmed.

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stances, could arguably constitute a favorable termination of the prior suit for purposes of bringing an action for malicious prosecution. Since we do not grant relief against the state judgment, however, we express no opinion on the merits of this issue.

FILED
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JOHN E. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969
No. 1345

JAMES D. SULLIVAN,

Petitioner,

vs.

EDWARD J. CHOQUETTE,
HARVEY BEIT, an attorney,
JONATHAN G. WELLS III, an attorney,

and

T. FRANCIS KELLEHER, former clerk of the Newburyport, Massachusetts District Court,

Respondents.

PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING

JAMES D. SULLIVAN,
50 Central Avenue,
Ocean City, New Jersey 08226
P.O. Box 462
(609) 399-1691

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. _____

JAMES D. SULLIVAN,

Petitioner,

vs.

EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT,
and
T. FRANCIS KELLEHER,

Respondents.

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

James D. Sullivan petitions for a rehearing arising from the United States Supreme Court's denial for a Petition for a Writ of Certiorari directed to the United States Court of Appeals for the First Circuit, entered on May 18, 1970.

OPINIONS BELOW

The denial for Certiorari is set forth in the Appendix as "A".

The Opinion of the United States Court of Appeals for the First Circuit is set forth in the Appendix as "B", and is also reported in 420 F. 2nd 674.

The United States District Court's ruling is set forth in the Appendix as "C".

The opinion in companion cases are set forth in the order below:

Sullivan v. Kelleher ..... 405 F. 2nd 486
(action in tort for wilful, wanton, and reckless conduct; negligence and unskillful conduct, and gross negligence)

Sullivan v. Choquette, et al ..... 289 F. Supp. 780
(action in tort for abuse of process; action for breach of contract of lease)

Sullivan v. Choquette, No. 7253 ..... Appendix "D"
U.S. Court of Appeals for First Cir.
(dismissed lack of prosecution)

Sullivan v. Choquette (Writ of Error) ..... unreported
Superior Court of Mass., Essex Co.,
No. 139,788, dismissed for want of jurisdiction of Superior Court over writ of error proceedings. Oct. 14, 1968

Sullivan v. Choquette ..... pending in action
and the Justices of the Newburyport
District Court (Writ of Error)
Supreme Judicial Court of Mass.,
Essex Co. No. 2663, filed February 7, 1970

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC 1254 from a judgment of the United States Court of Appeals for the First Circuit, entered on December 30, 1969, which affirmed a judgment of the United States District Court for the District of Massachusetts.

BASIS OF FEDERAL JURISDICTION

Federal Jurisdiction in the court of first instance was invoked under the fifth and fourteenth amendment of the Federal Constitution, and under 28 USC 1332, 28 USC 1343, 42 USC 1983, 42 USC 1985, and 42 USC 1986. Jurisdiction for partial relief prayed for was invoked under 28 USC 1651.

STATUTES INVOLVED

The Statutes involved are as follows:

Chapter 223, Section 31 SUMMONS: LEAVING AT THE LAST KNOWN ADDRESS, ETC. If the summons is not served personally on the defendant, the original or a copy, as the case may be, shall be left at his last and usual place of abode, if he has any in the Commonwealth known to the officer. If he has none, it shall be left with his tenant, agent, or attorney, if he has any within the Commonwealth known to the officer. If he has no such last and usual place of abode, and no tenant, agent or attorney, no service on him shall be required except as provided in the three following sections. MGLA C. 223 s 31.

Chapter 223, Section 34. FURTHER NOTICE TO ABSENT DEFENDANT. If the defendant is out of the Commonwealth, or if his residence is not known to the officer, and no personal service is made on him or on his

agent appointed under Section five of Chapter two hundred and twenty seven, he shall, in addition to the service herein prescribed, be entitled to further notice of the action as provided in said Chapter. MGLA C. 223 s 34.

Chapter 223, Section 84. DEFECTIVE SERVICE OF PROCESS; NECESSITY OF FURTHER SERVICE. If the service of a writ, process or order is defective or insufficient, the Court or tribunal to which it is returnable may, upon motion of the Plaintiff or Petitioner, issue further writs, processes and orders, which shall be served in such manner as may be therein directed; and upon due service thereof, the Court or tribunal shall thereby acquire the same jurisdiction of the subject and the parties as it would have obtained if such service had been made in pursuance of the original writ, process or order. The action, suit or proceeding shall be continued from time to time until such service is made. MGLA C. 223 s 84.

Chapter 227, Section 7. NOTICE. If a defendant in an action in the supreme judicial or superior court is absent from the Commonwealth or his residence is unknown to the officer serving the writ, and no personal service has been made on him or his agent appointed under Section five, or if the service of the writ is defective or insufficient by reason of a mistake of the Plaintiff or officer as to where or with whom the summons or copy ought to have been left, the Court, upon suggestion thereof by the Plaintiff, shall order the action to be continued until notice of the action is given in such manner as it may order. If the property of an absent defendant has been attached and the residence of such defendant is known to the Plaintiff and no legal service can be made upon him within the Commonwealth, except by publication, the Court may order personal service to be made on him in such manner as it may direct and, upon proof that service has been made, such defendant

shall be held to answer to the action. If the defendant does not appear, the Court may order the action continued and further notice given to him in such manner as it may direct. MGLA C. 227 s 7.

Chapter 231, Section 58. NOTICE OF DEFAULT OR DECREE PRO CONFESSO. Upon entry of a default or non-suit in an action at law or of an interlocutory decree in equity taking a bill pro confesso, the Clerk of the Court shall forthwith give written notice thereof, in such manner as the Court by rule shall direct, to the attorney of record, if any, of each party against whom such default, non-suit or decree is entered. If a party has no attorney of record, and if, in case of the entry of a default or interlocutory decree is as aforesaid, the officers return does not show that personal service of the writ, bill, or petition or complaint or order therein, as the case may be, has been made upon him, the notice shall be given to the party. MGLA C. 231 s 58.

Chapter 260, Section 2A. Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, actions of replevin, shall be commenced only within two years next after the cause of action accrues. MGLA C. 260 s 2A.

Chapter 260, Section 12. If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person so entitled to bring it, the period prior to the discovery of the cause of action so entitled shall be excluded in determining the time limited for the commencement of such action. MGLA C. 260 s 12.

REASONS FOR GRANTING THE PETITION FOR REHEARING

This Petitioner is satisfied by the pusillanimous ruling of The United States Court of Appeals, that, what is being defended here is not the legal grounds of rendering of default judgment void for error and fraud, but the doctrine of judicial immunity, whose armour has had a severe puncture and dent placed in it by the presence of a layman who has overcome all of the legal defenses set up by these Respondents in the form of the Statute of Limitations, and the doctrines of res judicata and judicial immunity; the only refutation of which has come in the fabricated form of "actual notice" by telephone, the reporting of which has carefully ommitted the 1500 miles distance the defendant traveled to appear on the date in the writ, with the circumstances creating an impossibility of appearance in conformity to that date. Another careful exclusion was that the defendant did not receive "actual notice" of the continued date, which was the actual trial date.[1] This now constitutes a monumental decision which reverses all prior decisions regarding service of process by constructive means, and now requires the defendants to bear the burden of service of process, and that now, 'due process' does not include "opportunity to be heard," only "actual notice," however distant the defendant may be.

Actually, in reality, the decision of the United States

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[1] Of all the acts of fraud by the Respondent Kelleher, the retroactive resetting on the docket of this date was the most prejudicial. The docket entries (Ex-128) appear to manifest that a continuance did not occur, yet the affidavit of the trial judge attests that it did. In either case the defendant Sullivan did not receive any "actual notice" of a continued date.

Court of Appeals is premised on fallicious grounds,[1] and the United States Supreme Court, by its unwillingness to review this dishonorable ruling, has condemned a cause of action which is based on the firmest of legal grounds. By its very context, this judgment imparts a false jurisdiction to a Massachusetts land court which committed a terrible error, and victimized a citizen and his children, whose only offense and crime was that his signature was needed to facilitate a seven thousand dollar land profit. This judgment protects the paradoxical situation that the very tort complained of here in the Plaintiff's Original Complaint is the creation of the false jurisdiction behind which the actors are hiding, while their tortious behavior continued with impunity.

For years, this Court and the Federal Courts have been passing down rulings to the effect that when a Court has jurisdiction over the subject matter, and the parties in suit, the Court and its judicial officers would logically enjoy the immunity of error, even if the error trespassed into excess of jurisdiction. And the words "excess" and "clear absence" have become the distinguishing nouns by which the Courts justified their position on the doctrine of judicial immunity.

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[1] These matters have had careful exclusion of fact and law in the reporting of judgments rendered. In *Sullivan v. Choquette*, 289 F. Supplement 780 (abuse of process) the order of execution was used to inflict injury by evicting the Sullivan family into severe winter weather of heavy snowfall and gale winds, with a child critically injured, caused by the haste of 8 daylight hours to find quarters, or to purchase the premises. In *Sullivan v. Choquette*, 289 F. Supp. 780 (breach of contract of lease) the Court said the State Court judgment necessarily stated it was Sullivan who breached the lease; yet the state court judgment was obtained by default through fraud and deception, consequently, the issues of who breached the lease has never been heard. In *Sullivan v. Choquette* in the instant matter the U.S. Court of Appeals carefully excluded in its reporting that one of the torts complaint of was fraud, which constitute jury issues of fact, not law, and the allegation of fraud was ommitted in reporting of this case at 420 F. 2d 674.

Still, this Petitioner, in his approach to this cause of action against the Respondent Kelleher, as the Clerk of the Newburyport District Court, has shown to the Court where the Massachusetts Court lost the jurisdiction on December 13, 1965, while the Defendant was out of the Commonwealth of Massachusetts, and why the Court failed to regain it by statutory and mandatory provisions of General Law C 223 s 34; C 223 s 84; and C 227 s 7 of the Commonwealth of Mass. It showed to this Court that the Respondent Kelleher falsely entered the Sullivan letter from Florida as a "general denial" to give the apparition that Sullivan had pleaded to the charge, and, in spite of the Court's continuance until December 30th, 1965, that no statutory notice of continuance was given in compliance with MGLA C. 227, s 7; and that on December 30th, 1965, although the opportunity to be heard was available, there was no actual notice, either personal or constructive, and the court failed to regain the jurisdiction of the subject and parties under MGLA C. 223, s 84. This burden fell on the Respondent Choquette, to offset this defect, the Respondent Kelleher crossed out the continued date in the docket entries (Ex-128) and entered a default on the original date, so that the docket entries would appear that no continuance occurred. The Defendant had arrived home to defend this frivilous charge, and it was important that he not be aware of the trial date. This was carefully followed through with no statutory notice of default, or execution, which would have given time to appeal. The order of execution was then used to force the future rent of one thousand dollars, ($1,000) and to force the immediate sale of the premises; or to vacate into a snowstorm.

Still yet, this Petitioner has shown to this Court, and to the United States Court of Appeals by solid rulings of United States Supreme, Federal, and Massachusetts Courts;

by Federal and State statutes, that the Newburyport District Court never, for one instant, obtained, or regained a valid jurisdiction over James D. Sullivan, and over the subject matter. Yet, to offset this, the United States Court of Appeals ruled in a completely oblique direct direction from the initial grounds for dismissal in the United States District Court (statute of limitation, and the doctrine of res judicata, and failure to state a cause of action arising from those grounds)[1] to give a land court a jurisdiction which it does not possess by the very statute of its creation, MGLA C, 223 s 84. In stating that a defendant has "actual notice" 1500 miles from the jurisdiction of that Court with only 48 hours to arrive and prepare a defense to a complaint which had not even been served, the Defendant is duty bound to travel at the speed of light, a situation directly in conflict with this Court's ruling in *Roller v. Holly*, 176 U.S. 398; 20 S. Ct. 410; 44 L. ed. 520. It has said that if the continuance occurred that no further service of process is afforded to consummate a valid jurisdiction which is in direct conflict with this Court's ruling in *Wetmore v. Karrick*, 27 S. Ct. 440; 205 U.S. 160. The frivolity of this decision insults the law of impendability, which states that two objects cannot occupy the same space at the same time; nor can a single object occupy two spaces at the same time. It has sidetacked the allegations of fraud, and

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[1] A writ of error in the Supreme Judicial Court of Massachusetts is now pending and has been severely prejudiced by Supreme Court's reluctance to review. The legal defenses of statute of limitations and res judicata have not been raised by the respondents; but ironically, this complaint was dismissed under those grounds in the United States District Court. The respondents have only filed general and categorical denials to the errors assigned. *Sullivan v. Choquette* and the Justices of the Newburyport District Court; No. 2663, Supreme Judicial Court of Massachustts, Essex County.

fraudulent concealment,[1] which are jury issues, and in reporting the Court of Appeals has carefully ommitted the nature of the twenty other errors which were in violation of Court Rules and State Statutes – all in an effort to save the doctrine of judicial immunity; and the United States Supreme Court, by its silence; and refusing to act by review, has given implying consent to this judgment, which has deviated from the patterns and course of the many decisions affecting due process of law; not only with respect to service of process, and opportunity to be heard, but more importantly, with respect to fairness in proceeding as the true test of due process. *Watson v. Patterson*, 358 F. 2nd 297, cert. denied 87 S. Ct. 153, 385 U.S. 876, 17 L. ed. 2nd 296.

It is even more shocking that when the facts and law justifys this Court's discretion to finally police its own judicial system to protect this valuable doctrine, the Court's silence in the matter has given added meaning as to why this doctrine must be eventually replaced with punshing and encumbering legislation to curb this self delegated power; for it is apparent that from the first conception of the doctrine of judicial immunity in *Bradley v. Fisher*, 13 Wall (U.S.) 335, 95 L. Ed. 646, the Court had intended a barrier known as "excess" and "clear absence" to distinguish jurisdiction; yet this Petitioner has irrefutably shown in the matters at bar, that "clear absence" was

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[1] With regard to the Statute of Limitations, fraud allegations extend the time limit on any action in tort or error under General Law C. 260, s 12 of the Commonwealth of Mass. Petitioner did not discover the fraud until Dec. of 1966, one year after the eviction into the snow storm.

the keynote,[1] and the U.S. Court of Appeals has run the grain against every Federal and Supreme Court decision, as well as Massachusetts State Court rulings, to give the Newburyport District Court an imaginary jurisdiction for an imaginary doctrine which now must exist even at the expense of the death of the Constitution of the United States, and its citizens rights. It now destroys that which created it.

These were the legal reasons for granting the Writ, but aside from these, the Petitioner will give to this Court an extremely high moral reason, which, if this Court has any concept of our existence beyond, it will pay heed. At the inception of these matters, the Petitioner sought relief and damages in the form of the return of the Blessed Statutes of The Lady of the Rosary and the Children of Fatima, who were also evicted from the front law of 16 Summit Place, Newburyport, Mass. The tenant-lessee Sullivan had been in the State of Florida, and was building and maintaining an interstate business for the express purpose to earn excess monies to support and perpetuate a National 54 day Rosary Novena to the Queen of the Holy Rosary; to incite and impell families to recite the Rosary; to assist the bringing

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[1] On December 13, 1965, the service of the writ of summary process was constitutionally defective, and in violation of Massachusetts General Laws C. 223 s. 31, C. 223 s. 34, C. 223 s. 84, and C. 227 s. 7. To cure this defect the Clerk of Court, the Respondent Kelleher falsely entered, and fraudulently hid the Sullivan letter from Florida as a "general denial" thereby perfidiously joining the issues, and sending the matter along to judgment. After the Respondents Wells, Beit and Choquette had failed to give statutory notice of continuance (C. 227 s. 7) of the date of December 30th, 1965 as the new trial date, Kelleher falsified the docket entries (Ex-128) to give the appearance that a continance did not occur, along with its required statutory notice of a continuance, with proof thereof. He followed this with the ommission of a statutory notice of default, while the Respondents Wells, Beit, and Choquette gave no service of motions or amendments, pleadings of which are integral part of the record. At no time had the Newburyport District Court gained any type of jurisdiction; and the actions of all of the Respondents were perpetrated in the "clear absence" of any type of jurisdiction, whatsoever.

of peace and love to the hearts of all men, and for the conversion of Russia from the errors she has spread on the world. It has become increasingly apparent from the conflict in Viet-Nam that this conversion, cannot, and will not, be consumated by war and force; only by prayer, as was warned in the message at Fatima, Portgual in 1917 by the Lady of the Rosary.

While in the action of accomplishing this, this Petitioner was called from his task to drive fifteen hundred miles to defend a groundless and malicious charge, and to await a trial, and statutory notice of the date thereof, only to have his constitutional rights flaunted to the winds for the sake of a seven thousand dollar land profit; and his subsequent legal remedies, and causes of action for proper redress completely disregarded by the ludicrious decision of the Federal Courts in Massachusetts, to protect the doctrine of judicial immunity.

These matters were brought to the attention of this Court by the same tenant-lessee, and this Petitioner has presented law and facts with regard to "clear absence" of jurisdiction which gives this Court a clear mandate emanating from the language of ***Bradley v. Fisher, supra,*** as to its duty to guard this nation's judicial system from corruption from within, and to take its whip to the money changers who are still in the temple. The doctrine of judicial immunity will not be a valid excuse in the Court where all of the Judges will be judged, and where the Lady of the Rosary will be called as the very first witness.

CONCLUSION

This Court should possess the courage to send this cause of action back to the United States District Court, with instructions to invalidate the default judgment of the Newburyport District Court, No. 7314 of 1965, and to remand the triable issues of fraud and malicious prosecution to a jury for trial on the merits, on all of the Respondents, including the Respondent Kelleher, where in its final analysis, the money damages will bring the status quo of this Novena to a point where it might have been in December of 1965. There is an inscription at the entrance of a Federal Building in Washington, D.C. which reads

EQUAL JUSTICE TO ALL, UNDER THE LAW

This Petitioner, and the Lady of the Rosary, to date, have not yet found it.

Respectfully submitted,

James D. Sullivan /s/
JAMES D. SULLIVAN

It is hereby certified that this petition for a rehearing of a Writ of Certiorari directed to the United States Court of Appeals for the First Circuit is being presented to this Court in the highest degree of faith, and presented to avert an abortion of justice by the omission of facts and law reported by the United States Court of Appeals for the First Circuit, and is restricted to the grounds of the matter of judicial immunity and the jurisdiction which creates it. I also certify that this petition is presented to this Court by this Petitioner to safeguard our judicial system to the benefit of its two million citizens, and for this Nation, as a whole.

I also certify that I have served upon the Respondents Choquette and Kelleher two copies of the foregoing petition for rehearing, by service through the mails directed to their attorney of record, Benjamin Goldman, Esq. of 6 Beacon Street, Boston, Massachusetts; and two copies to the Respondents Beit and Wells, by service through the mails directed to their attorney of record, John F. Cogan Jr., of 28 State Street, Boston, Mass.

James D. Sullivan /s/
JAMES D. SULLIVAN

APPENDIX "A"

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

May 18, 1970

RE: SULLIVAN v. CHOQUETTE, ET AL.,
No. 1345, Oct. Term, 1969

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

John F. Davis, Cle
By
E. L. Wheeler
Assistant Clerk

Mr. James D. Sullivan,
50 Central Ave.
Ocean, City, NJ. 08226

United States Court of Appeals
For the First Circuit

No. 7404.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT,
v.
EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT
and
T. FRANCIS KELLEHER,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

James D. Sullivan pro se.
Benjamin Goldman for Edward J. Choquette et al., appellees.
David S. Mortensen, with whom *John Kimball, Jr.*, and *Hale and Dorr* were on brief, for Johnathan G. Wells et al., appellees.

December 30, 1969.

PER CURIAM. This is an action for malicious prosecution, abuse of process and for relief from a judgment of eviction of the Newburyport District Court of Massachusetts.[1] Our jurisdiction is invoked under the civil rights

[1] This litigation has had a long history in the federal courts. Plaintiff first sued defendant Kelleher for damages for an alleged deprivation of his constitutional rights in that Kelleher, as clerk of the state court, entered a default judgment against him in the eviction action with knowledge that legal notice of the suit had not been

provisions, 28 U.S.C. § 1343 (1964) and 42 U.S.C. §§ 1983, 1985 (1964), and the diversity statute, 28 U.S.C. § 1332 (1964). Plaintiff appeals from the dismissal of his complaint by the district court, for, inter alia, failure to state a claim upon which relief can be granted. The essential facts are set out in the district court's opinion in *Sullivan I, supra,* note 1.

It is plain that an action for malicious prosecution will not lie unless there has been a termination of the prior proceedings in a manner favorable to the plaintiff. *Dangel* v. *Offset Printing, Inc.*, 342 Mass. 170 (1961); W. Prosser, Torts §§ 113-14 (3d ed. 1964). As the judgment of eviction rendered by the state court still stands, plaintiff has no cause of action unless relief is granted against that judgment. Hence, we proceed to consider that aspect of the case.

Plaintiff claims that service of process in the eviction action was constitutionally defective, that the state court therefore did not have jurisdiction, and that we should grant a "writ of error" to the state court, reversing or vacating the judgment. While we do not have the power to "annul, vacate, correct or otherwise alter the prior judgment" of a state court, we do have equitable jurisdiction

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given. That action was dismissed by the district court on grounds of judicial immunity and we affirmed. *Sullivan* v. *Kelleher*, 405 F.2d 486 (1st Cir. 1968). He next brought suit for breach of the lease of the premises from which he was evicted, abuse of process, and slander against defendants Choquette and Wells and one Jean MacDonald. The district court granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette*, 289 F.Supp. 780 (D. Mass. 1968), *appeal dismissed for want of prosecution*, No. 7253 (1st Cir., Feb. 21, 1969) [hereinafter cited as *Sullivan I*].

To the extent that this action states a claim for abuse of process, the district court was correct in dismissing it. Such a claim is plainly concluded by the decision in *Sullivan I* as well as barred by the statute of limitations. Moreover, the dismissal of the complaint as to defendant Kelleher was clearly proper, as his immunity from suit was conclusively determined by our decision in *Kelleher, supra.*

jurisdiction is invoked under the civil rights provisions, 28 U.S.C. §1343 (1964) and 42 U.S.C. §§1983, 1985 (1954), and the diversity statute, 28 U.S.C. §1332 (1964). Plaintiff appeals from the dismissal of his complaint by the district court, for, inter alia, failure to state a claim upon which relief can be granted. The essential facts are set out in the district court's opinion in *Sullivan I, supra,* note 1.

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Plaintiff claims that service of process in the eviction action was constitutionally defective. that the state court therefore did not have jurisdiction, and that we should grant a "writ of error" to the state court, reversing or vacating the judgment. While we do not have the power to "annul, vacate, correct or otherwise alter the prior judgment" of a state court, we do have equitable jurisdiction to grant relief from the effects of such a judgment in an appropriate case.[2] 7 J. Moore, Federal Practice ¶60.36 (2nd ed. 1968). This is not, however, such a case.

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486 (1st Cir. 1968). He next brought suit for breach of the lease of the premises from which he was evicted, abuse of process, and slander against defendants Choquette and Wells and one Jean MacDonald. The district court granted summary judgment for the defendants on all three counts. *Sullivan* v. *Choquette*, 289 F.Supp 780 (D. Mass. 1968), *appeal dismissed for want of prosecution*, No. 7253 (1st Cir., Feb. 21, 1969) [hereinafter cited as *Sullivan I*].

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[2] Equitable relief against the state judgment, under some circum-

Service of process in the state case was made by leaving the writ at the demised premises in accordance with Mass. G.L.A. ch. 223, §31. Plaintiff received actual notice of service from his wife, who informed him of the contents of the writ over the telephone. In actions concerning rights in property within the state, due process requires only that reasonable notice and an opportunity to be heard be afforded. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); F. James, Civil Procedure §§12.1, 12.7, 12.11 (1965); Restatement of Judgments §32, comments a, f, and g (1942); see *Wagner* v. *Wagner*, 293 F.2d 533 (D.C. Cir. 1961); *Schultz* v. *Walker*, 130 F.2d 907 (7th Cir. 1942). While some commentators have expressed doubts as to the constitutionality of service made by simply leaving process at the last and usual place of abode, the doubts have concerned the likelihood of the defendant not receiving actual notice of the action. James, *supra* §12.11, at 650-51. Since plaintiff in this case had actual notice, we find no defect in the service of process. The district court was therefore correct in dismissing this aspect of the complaint for failure to state a claim and, since there has not been a favorable termination of the state eviction proceeding, the court was also correct in dismissing the malicious prosecution count.

Affirmed.

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stances, could arguably constitute a favorable termination of the prior suit for purposes of bringing an action for malicious prosecution. Since we do not grant relief against the state judgment, however, we express no opinion on the merits of this issue.

APPENDIX "C"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 68-983-G
Civil Action No. 68-983-G

JAMES D. SULLIVAN,

PLAINTIFF

v.

EDWARD J. CHOQUETTE ET AL.,

DEFENDANTS

MEMORANDUM OF DECISION
AND ORDER OF DISMISSAL

May 27, 1969

GARRITY, J. This case arises upon plaintiff's complaint against four individual defendants brought for the stated purpose of effecting reversal of a writ of summary process entered by the Newburyport District Court and for damages allegedly arising from the fraudulent issuance and procurance of the writ. The court presently has before it various motions, including motions by each defendant to dismiss the complaint and a motion by the plaintiff for summary judgment on defendant Kelleher's counterclaim for an order enjoining plaintiff from bringing additional suits arising from the transaction at bar.

The facts upon which this complaint is premised have been before this court twice previously[1] and are reported in *Sullivan* v. *Choquette*, D. Mass., 1968, 289 F.Supp. 780. For the purposes of consideration of the defendant's

[1] In *Sullivan* v. *Kelleher*, Civil Action No. 67-919-C, defendant's motion to dismiss was allowed on June 26, 1968, on the ground that defendant was judicially immune. The judgment was affirmed, *Sullivan* v. *Kelleher*, 1 Cir., 1968, 405 F.2d 486.

In *Sullivan* v. *Choquette*, Civil Action No. 67-961-C, defendants' motions to dismiss were allowed on September 30, 1968, reported at 289 F.Supp. 780. Appeal docketed, No. 7253, 1 Cir., was dismissed for lack of prosecution on February 21, 1969.

presently pending motions, the facts alleged by the resisting party are, of course, assumed to be true.

I

Each defendant asserts multiple grounds in support of his motion for dismissal. Since the motions must be granted, only some of these grounds need be specifically discussed by the court.

1. *Statute of Limitations.* All defendants have moved to dismiss on the ground that the statute of limitations has run. This suit, whether in tort or for violation of the Civil Rights Act, 42, U.S.C. §§1983, 1985 and 1986, is governed by the applicable Massachusetts statute of limitations. The most analogous and applicable Massachusetts statute of limitations is that of Mass. G.L. c. 260, §2A, which provides a two-year limitation for all but certain specified actions which are not related to that at bar. Cf. *Mulligan* v. *Schlachter,* 6 Cir., 1968, 389 F.2d 231, *Henig* v. *Odorioso,* 3 Cir., 1967, 385 F.2d 491, cert. den. 390 U.S. 1016, rehearing den. 391 U.S. 929. Since the last of the defendants' acts complained of took place not later than February 4, 1966, this suit, which was filed on October 30, 1968, is barred by the statute of limitations.

2. *Judicial immunity.* Defendant Kelleher has moved to dismiss on the ground of judicial immunity. All of Kelleher's acts which are complained of where acts within the scope of his duties as clerk of the Newburyport District Court. Kelleher is therefore immune from suit on the ground of judicial immunity. *Sullivan* v. *Kelleher,* 1 Cir., 1968, 405 F.2d 486.

3. *Res judicata.* Each defendant has moved to dismiss on the ground of res judicata. The facts recited in the complaint in this case are identical to those in two suits in this court previously brought by plaintiff and dismissed.[2] Each defendant in this case was a defendant in one of those

[2] See footnote 1 above.

two cases except defendant Beit, who is joined here solely as a law partner of defendant Wells and who is not alleged to have otherwise been involved. The previous suit against defendant Kelleher (C.A. No. 67-919-G) was premised both in tort and under the Civil Rights Act of 1871, as is this case, and is therefore res judicata on all issues raised in this case against defendant Kelleher. The previous suit against defendants Choquette and Wells (C.A. No. 67-961-C) was brought in tort with jurisdiction based upon diversity of citizenship; that suit did not claim a cause of action under the Civil Rights Act of 1871. To the extent that plaintiff's claim is in tort for malicious prosecution or abuse of process, the judgment in that case (C.A. No. 67-961-C) is res judicata since it involves the identical cause of action and facts. Restatement of Judgments §50 (1942); 1B, Moore, Federal Practice, Para. O.409(1) at 1005 (2nd ed. 1965). Plaintiff's claim against defendant Beit is barred to the same extent that it is against defendants Choquette and Wells by C.A. 67-961-C since his alleged involvement in a malicious prosecution or abuse of process is no more than derivative from that of defendant Wells. The remainder of this suit, plaintiff's claim under the Civil Rights Act of 1871 that defendants Choquette, Wells and Beit have by conspiracy prevented plaintiff from receiving due process of law in courts of the Commonwealth of Massachusetts, is of the same purport and substance as plaintiff's prior suit for malicious prosecution and abuse of process (C.A. 67-961-C) and therefore is also barred under the doctrine of res judicata. See *Mendez* v. *Bowie*, 1 Cir., 1941, 118 F.2d 435; see also 1B, Moore, Federal Practice, Para. O.409(1) at 1005-1008 and Para. O.410(1) and (2) at 1151-1184 (2nd ed. 1965); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 826-828.

4. *Failure to state a cause of action.* Plaintiff's complaint alleges that the defendants have conspired and act-

ed under the color of law to deprive plaintiff of his civil rights. "State proceedings do not become civil rights matters by generalized, not to mention unsupported, allegations . . . " *Ronan* v. *Stone*, 1 Cir., 1968, 396 F.2d 502, 503. There is in this complaint no statement of a claim as required by Fed. R. Civ. P. 8 to support plaintiff's allegation of a denial of his civil rights. Plaintiff's complaint, therefore, fails to state a cause of action upon which relief may be granted.

II

In view of the allowance of defendants' motions to dismiss, the motion of defendant Wells to dissolve attachment is granted, all other motions pending in this case are denied, and defendant Kelleher's counterclaim is dismissed for want of independent jurisdiction. Cf. *Strachman* v. *Palmer*, 1 Cir., 1949, 177 F.2d 427; see also *United Mine Workers* v. *Gibbs*, 1966, 383 U.S. 715.

So ordered.

(s) W. Arthur Garrity, Jr.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7404.

JAMES D. SULLIVAN,
PLAINTIFF, APPELLANT
v.
EDWARD J. CHOQUETTE,
JONATHAN G. WELLS III,
HARVEY BEIT
and
T. FRANCIS KELLEHER,
DEFENDANTS, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges*

James D. Sullivan pro se.
Benjamin Goldman for Edward J. Choquette et al., appellees.
David S. Mortensen, with whom *John Kimball, Jr.*, and *Hale and Dorr* were on brief, for Jonathan G. Wells et al., appellees.

December 30, 1969

PER CURIAM. This is an action for malicious prosecution, abuse of process and for relief from a judgment of eviction of the Newburyport District Court of Massachusetts.[1] Our

[1] This litigation has had a long history in the federal courts. Plaintiff first sued defendant Kelleher for damages for an alleged deprivation of his constitutional rights in that Kelleher, as clerk of the state court, entered a default judgment against him in the eviction action with knowledge that legal notice of the suit had not been given. That action was dismissed by the district court on grounds of judicial immunity and we affirmed. *Sullivan* v. *Kelleher*, 405 F.2d

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7253

JAMES D. SULLIVAN

Plaintiff-Appellant

vs

EDWARD J. CHOQUETTE ET AL.

Defendants-Appellees

ORDER OF THE COUR

entered Feb. 21, 1969 Filed Feb. 21, 1

Plaintiff-appellant having taken no action in response to a motion of his counsel to withdraw or to respond by Feb. 17, 1969 to his duty to proceed in this court, and not having responded to motions of appellees to dismiss, file Feb. 4 and 14 respectively, for failure to prosecute diligently his appeal in which his attention was specifically called to his obligations and lack of interested counsel,

It is hereby ordered that the appeal herein be, and the same hereby is, dismissed for lack of prosecution.

By the Court

Roger A. Stinefield
Clerk